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No.

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, and
EDWIN MEESE III, ATTORNEY GENERAL,
Respondents.

OLIVER L. NORTH,
Petitioner,

v.

EDWIN MEESE III, ATTORNEY GENERAL, and
LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: December 30, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the target of a federal criminal investigation being conducted in violation of the Constitution and laws of the United States is absolutely barred from seeking declaratory or injunctive relief from that investigation in federal court.

PARTIES TO THE PROCEEDINGS

Oliver L. North was a plaintiff in the district court, was an appellant in the court of appeals, and is the petitioner in this Court.

Lawrence E. Walsh, Independent Counsel, was a defendant in the district court, was an appellee in the court of appeals, and is a respondent in this Court.

Edwin Meese III, Attorney General, was a defendant in the district court, was an appellee in the court of appeals, and is a respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Oliver L. North, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on October 1, 1987.

OPINIONS BELOW

The memorandum opinions and orders of the United States Court of Appeals for the District of Columbia Circuit are reprinted as Appendix A and Appendix B to this Petition. The opinion of the United States District Court for the District of Columbia is reprinted as Appendix C to this Petition.

JURISDICTION

The memorandum opinions and orders of the court of appeals affirming the district court's dismissal were entered on October 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Oliver L. North is a principal target in the investigation by Independent Counsel Lawrence E. Walsh into the "Iran/Contra Affair." In this petition, he seeks review of the dismissal of two related but distinct civil actions challenging Mr. Walsh's investigative and prosecutorial authority. At issue here is the extent to which federal courts may safeguard citizens against federal criminal investigations that are alleged to be unlawful and unconstitutional.

On December 19, 1986, the Division for Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit entered an order pursuant to the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-98 ("Ethics Act"), appointing Lawrence E. Walsh as independent counsel and defining his jurisdiction. Although the order of the special court identified broad categories of people subject to the investigation, it specifically identified only one individual, petitioner here, by name. On January 28, 1987, Mr. Walsh impaneled a grand jury. Since that time, he has served numerous

subpoenas and has identified petitioner as a target of his investigation.

On February 24, 1987, petitioner filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment that the independent counsel provisions of the Ethics in Government Act are unconstitutional. (App. 26a) The suit named Independent Counsel Walsh and the Attorney General of the United States as defendants. The complaint alleged that the independent counsel and his staff were engaging in law enforcement activities without any authority to do so. Specifically, petitioner argued that he should not be subject to investigation by persons who, although without any lawful authority to act, were compelling disclosure of private information (including private tax information) about him, coercing subpoena compliance by persons in privity with him, disclosing confidential information in violation of grand jury secrecy provisions, and in numeorus other ways causing him serious and irreparable injury.

Petitioner sought no preliminary or temporary relief when he filed this complaint. Instead, because the complaint sought declaratory relief—and thereafter injunctive relief as appropriate—no interference with the independent counsel investigation was sought until after a considered determination on the merits.

On March 2, 1987, Independent Counsel Walsh filed a motion to dismiss the complaint asserting that petitioner's action constituted an impermissible collateral attack upon an ongoing criminal investigation; that the claims presented were premature and not ripe for adjudication; and that the independent counsel provisions of the Ethics Act are constitutional. The Attorney General similarly filed a motion to dismiss, joining Independent Counsel Walsh's procedural arguments and additionally maintaining that the petitioner lacked standing to challenge the Act's constitutionality.

At the same time, on March 5, 1987, in response to petitioner's court action, the Attorney General promulgated a new regulation, 28 C.F.R. Parts 600 and 601, purporting to establish an "Office of Independent Counsel: Iran/Contra" within the Department of Justice, and appointing respondent Walsh to head that office. The regulation authorized respondent to conduct an investigation of the same scope as the one that he was conducting under the Ethics Act. The following day, petitioner filed a second complaint in the United States District Court for the District of Columbia against the Attorney General and Independent Counsel Walsh (App. 42a) and charged that the enabling regulation promulgated by the Attorney General was "rife with constitutional and statutory infirmities." (App. 13a). The respondents each moved to dismiss that complaint as well.

The district court dismissed both complaints. Without any reference to the factual allegations in the complaints, such as improper disclosures of grand jury information, the court ruled in a single opinion that "plaintiff has not alleged a sufficient hardship to meet the ripeness standard and to warrant anticipatory judicial involvement in the ongoing criminal investigation." (App. 14a).

Petitioner appealed the dismissal of both complaints to the United States Court of Appeals for the District of Columbia Circuit. Respondent Independent Counsel Walsh moved for summary affirmance in reliance on that court's recent decision in *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987) (App. 70a). In *Deaver*, the court of appeals had considered the effort of former White House Deputy Chief of Staff Michael K. Deaver to win a preliminary injunction against a grand jury's return of an indictment the following day. Mr. Deaver had argued that he would be irreparably injured *by the indictment*, citing as injury the " 'continuing destruction of his business,' " " 'injury to his reputation and dignity,' " and " 'the expenditure of substantial resources in his de-

fense.'" *Deaver* v. *Seymour*, 822 F.2d at 72 (D. H. Ginsburg, J., concurring) (App. 83a). The court of appeals held that Rule 12(b)(1) of the Federal Rules of Criminal Procedure provided Mr. Deaver with an adequate non-injunctive remedy for injuries arising out of an indictment, by providing for dismissal of the indictment where appropriate.

Petitioner challenged the motion for summary affirmance on the ground that his claims arise in a different context from Mr. Deaver's, raise different issues and require a different result. In particular, petitioner argued that he does not complain of injury from a grand jury's return of an indictment, as had Mr. Deaver, but rather seeks a declaration that the independent counsel does not enjoy lawful authority, *inter alia*, to compel disclosure of personal information such as tax returns; to coerce compliance with subpoenas by persons in privity with petitioner; and to disclose confidential matters to the Congress and the public. Petitioner argued that each of those actions, and many others, injured and continues to injure his federally protected rights in a way that would not and could not be remedied by a dismissal of an indictment, should he be indicted, and which obviously might not be addressed if there were to be no indictment. Petitioner maintained that the court had either to conclude that the law somewhere provided an adequate remedy for the injuries alleged (as it had in the case of Mr. Deaver's injury arising out of an indictment) or that the injuries alleged were not cognizable. Neither issue was addressed by the *Deaver* panel.

Petitioner further argued that, unlike Mr. Deaver, he does not seek a preliminary injunction but rather a declaratory judgment and thereafter, if appropriate, permanent injunctive relief. Petitioner argued that there is no basis for assuming, on the basis of the *Deaver* holding, that the same standard that was applied in *Deaver* to a request for a preliminary injunction would apply to

a request for a declaratory judgment and cited this Court's holding in *Steffel* v. *Thompson*, 415 U.S. 452, 471 (1974).

Without even acknowledging these significant differences from *Deaver*, the court of appeals summarily affirmed the district court's dismissal of the two complaints in a two-paragraph opinion. (App. 1a, App. 3a). The court broadly ruled that petitioner

> "has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action. It is clear, after *Deaver*, that potential criminal defendants 'cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure.' [*Deaver v. Seymour*, 822 F.2d] at 71. Accordingly, because the order of the district court dismissing the complaint in this case was clearly correct, . . . we affirm."

App. 2a and App. 4a (citation omitted). The court of appeals did not address petitioner's core argument that the Rules of Criminal Procedure provide no remedy for the injury alleged in his complaints.[1]

REASONS FOR GRANTING THE WRIT

I. The Decision of the D.C. Circuit Conflicts With a Recent Decision of the Eleventh Circuit.

The rule adopted by the D.C. Circuit—that the subject of a federal grand jury investigation is absolutely barred from bringing a civil action to challenge the constitutionality of that investigation—conflicts directly with recent decisions of the Courts of Appeals for the Ninth Circuit (which subsequently was vacated) and the Eleventh Circuit allowing pre-indictment civil challenges to federal

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[1] Pursuant to Rule 19.4 of the Rules of this Court, this single petition seeks review of the two orders of the court of appeals, which involve identical or closely related issues.

criminal investigations. This Court previously determined that the issue presented by these cases is proper for review when it granted certiorari in the case arising in the Ninth Circuit, *see Russoniello* v. *Olagues*, 55 U.S.L.W. 3712, 107 S.Ct. 1885 (1987) (granting certiorari), but the Court later vacated the judgment of the court of appeals when the case became moot. *See* 56 U.S.L.W. 3241, 108 S.Ct. 52 (1987) (vacating judgment and remanding to court of appeals for dismissal as moot). This case presents the same significant issue, which is one on which the federal courts of appeals are now deeply divided. Review by this Court is therefore clearly warranted.

1. *Russoniello* v. *Olagues*, *supra*, arose as a class action against federal and state officials involved in a voting registration fraud investigation. Plaintiffs were a Hispanic-American citizen randomly selected for investigation and certain organizations that promote voting rights of Hispanic and Chinese Americans in the San Francisco area. Plaintiffs alleged that the investigation interfered with their statutorily protected right to vote, discriminated against them on the basis of race and national origin, and deterred the exercise of their First Amendment right to freedom of association. *See Olagues* v. *Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *cert. granted*, 55 U.S.L.W. 3712, 107 S.Ct. 1885 (1987), *vacated and remanded*, 56 U.S.L.W. 3241, 108 S.Ct. 52 (1987). They sought injunctive, declaratory and monetary relief. The district court dismissed the complaint, holding "that, 'as a matter of law', it lacked 'jurisdiction to enjoin or otherwise control' [a preliminary investigation of the U.S. Attorney's Office]." *Id.* at 1519. It addressed plaintiffs' request for declaratory relief on the merits and ruled in the government's favor both on that issue and with regard to monetary relief.

The Ninth Circuit, sitting *en banc*, reversed. It held that plaintiffs had standing to raise their claims, that

the district court had jurisdiction to enjoin the investigation, and that the case should be remanded for the district court to determine whether an injunction should issue. Like the district court, the Ninth Circuit also addressed the prayer for declaratory relief on the merits, but it ruled that the voter fraud investigation directed toward foreign-born, recently registered voters requesting bilingual ballots burdened plaintiffs' fundamental right to vote and interfered with their right of association. Thus, confronted with a pre-indictment request for civil injunctive and declaratory relief from an allegedly unconstitutional investigation, the Ninth Circuit ruled that such an action could properly go forward. Even the dissenting judges argued only that injunctive relief would be improper on the facts alleged, not that it was altogether foreclosed—as the D.C. Circuit subsequently held.

In its subsequent petition for a writ of certiorari, the United States characterized the issue raised as "whether a federal court has authority under Article III of the Constitution to consider a pre-indictment challenge to the manner and scope of noncoercive, criminal investigative activities by a United States Attorney," Petition of the United States for Certiorari in No. 86-1217 at 11, and if so, when it may exercise that authority. *Id.* The Solicitor General explained: "Because of the recurrent nature of those issues and their critical significance to both general principles of separation of powers and the effective operation of the federal criminal justice system, this Court's review is warranted." *Id.* at 11-12. As noted above, this Court granted certiorari but later vacated that order when the case became moot. As the Solicitor General stated, the issue presented by *Russoniello*, like that presented by this case, is a recurrent and significant one in need of resolution by this Court.

Moreover, the Ninth Circuit holding that litigants may challenge the constitutionality of a federal criminal *investigation* before, and regardless of the likelihood of,

any indictment, squarely conflicts with that of the D.C. Circuit, which held that litigants are *absolutely* prohibited from challenging the constitutionality of a federal criminal investigation prior to any indictment.

The more recent decision of the Eleventh Circuit in *Smith* v. *Meese*, 821 F.2d 1484 (11th Cir. 1987), also conflicts with the D.C. Circuit's ruling. In *Smith*, the court of appeals expressly followed the *en banc* Ninth Circuit ruling in *Olagues* v. *Russoniello*, *supra*, and reversed the district court's dismissal of a complaint for injunctive relief from unconstitutional criminal investigations conducted by federal law enforcement officers.

Plaintiffs in *Smith*, black voters and elected officials, had alleged that the Department of Justice was "engaged in a concerted and unlawful effort both to interfere with black citizens' associational and political activities in Alabama's 'Black Belt' and to discourage them from exercising their right to vote, . . ." *Id.* at 1486. The district court dismissed the case on the ground that the separation of powers doctrine precludes federal court review of the Justice Department's investigative activities, and on the additional ground that plaintiffs lacked standing to maintain the action.

The court of appeals reversed. It recognized that plaintiffs were not, and were not expected to be, targets of an investigation or prosecution; rather, the court observed, plaintiffs challenged "a policy and pattern of investigative and prosecutory decisions," *id.* at 1489, which they claimed deprived them of their constitutional right to vote and associate freely. The court of appeals rejected the claim that separation of powers principles absolutely bar federal court intervention in the prosecutorial and investigative process, holding that the judicial branch has "the power and the obligation to redress" a constitutional violation when the other branches fail in that duty. *Id.* at 1493. The court also held that plain-

tiffs had standing to contest allegedly unconstitutional prosecution policies, even though plaintiffs were not themselves current or likely future targets of discriminatory prosecutions and investigations. Citing the Ninth Circuit's decision in *Olagues* v. *Russoniello*, *supra*, for the proposition that a "direct target" of an unconstitutional investigation or prosecution has standing to attack the violation, *id.* at 1493 (citing *Olagues* v. *Russoniello*, 797 F.2d at 1517-18), the court held that the non-target plaintiffs in *Smith* also had alleged sufficient injury to have standing. The court remanded the case for further proceedings.[2]

2. In *Olagues* and *Smith* the courts of appeals each ruled that allegations of injury arising out of an unconstitutional federal criminal investigation suffice to permit plaintiffs to seek declaratory and injunctive relief, even if plaintiffs have not yet been, and might not ever be, indicted. These rulings take as a given that a remedy for any subsequent indictment would not adequately also remedy the injury resulting from an unconstitutional investigation. In *Deaver* and *North*, the D.C. Circuit ruled expressly to the contrary, holding that plaintiffs subject to an unconstitutional federal criminal investigation cannot seek declaratory and injunctive relief from any injury arising out of that investigation, other than indictment. Under this ruling, the *Olagues* and *Smith* actions would have been barred, because plaintiffs there were not yet indicted. The conflict between the rulings is indisputable.

At issue in each of these cases is the extent, if any, of judicial relief available from unconstitutional federal criminal investigations that may or may not lead to indictments. While the courts address the issue under

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[2] To counsel's knowledge, the United States has not yet decided whether to seek certiorari in the *Smith* case. If it does, and if certiorari is granted, petitioner respectfully requests that this case and that one be considered together.

various headings, including separation of powers, standing, ripeness, and equitable discretion, the core issue is always the same: whether a citizen has a right to injunctive or declaratory relief from an unconstitutional federal criminal investigation, or whether prosecutors—including those who are alleged to exercise no lawful authority whatsoever—have absolutely free rein to investigate citizens in violation of the Constitution and laws of the United States, subject only to dismissal of any indictment subsequently brought. The absolute, "hands-off" ruling of the D.C. Circuit—which completely forecloses any effort to seek injunctive or declaratory relief from an unlawful investigation—is unprecedented, and is in conflict with the reasoning and result of the Ninth and Eleventh Circuit decisions. Review by this Court is therefore clearly warranted.

II. The Decision of the D.C. Circuit Conflicts With This Court's Decision in *Steffel* v. *Thompson* and Radically Expands the *Younger* Doctrine of Equitable Restraint.

The D.C. Circuit's unprecedented holding—that there can be no occasion warranting declaratory or injunctive relief from any federal criminal investigative activities—conflicts with this Court's ruling in *Steffel* v. *Thompson*, 415 U.S. 452 (1974) and radically restricts the availability of declaratory and injunctive relief from unlawful actions by federal officials. The result of the decision is to transform the longstanding policy against federal injunctive relief from pending state prosecutions into a prohibition on federal declaratory or injunctive relief from federal prosecutions or investigations. This extraordinary transformation and expansion of the doctrine of equitable restraint cannot stand absent review by this Court.

In defining the proper relationship between federal and state courts, this Court in recent years has cautioned restraint in federal court interference, through

injunctive relief, with pending state criminal prosecutions. In *Younger* v. *Harris*, 401 U.S. 37 (1971), this Court outlined "[t]he precise reasons for [the] long-standing public policy against *federal* court interference with *state* court proceedings." *Id.* at 43 (emphasis supplied). The first reason cited was the basic principle of equity jurisprudence. But the Court then noted that "an even more vital consideration, the notion of 'comity,'" *id.* at 44, is involved when federal courts are asked to enjoin proceedings in state court. This key principle, which rests on the premise that "National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways," *id.*, led this Court to conclude that a federal court will not enjoin pending state proceedings unless "the threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 46. *See also Samuels* v. *Mackell*, 401 U.S. 66 (1971) (same principles preclude declaratory relief from pending state court actions).

The doctrine of equitable restraint fashioned in *Younger* was not, however, a flat prohibition. While the *Younger* Court ruled that the "cost, anxiety, and inconvenience" of having to defend against a single prosecution alone do not constitute irreparable injury warranting relief, *id.* at 46, it also held that injunctive relief might be appropriate in exceptional circumstances—where, for example, there is a showing of bad faith, or of harassment, or where the state law at issue is flagrantly unconstitutional, or where other "extraordinary" circumstances exist. *Id.* at 53. Since *Younger*, this Court has largely left open the scope of the exception for the "other extraordinary circumstances" in which federal court intervention with pending state proceedings would be appropriate. But no case has suggested that *Younger* absolutely precludes all declaratory and injunctive relief, even from pending state court proceedings.

Shortly after the decision in *Younger*, this Court made clear that the *Younger* proscription would not operate to bar a federal court from granting declaratory relief when a state prosecution has been threatened but is not pending, even in the absence of bad faith or other special circumstances. In *Steffel* v. *Thompson*, 415 U.S. 452 (1974), this Court observed that "different considerations" animate the decisions whether to grant declaratory and injunctive relief, *id.* at 469, and that the concerns for equity, comity, and federalism that underlay the *Younger* holding " 'have little force in the absence of a pending state proceeding,' " *id.* at 462 (quoting *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. 498, 509 (1972)). Under *Steffel*, where declaratory relief is sought, and where there is no state prosecution pending, the *Younger* rules do not apply and a plaintiff need not demonstrate irreparable injury in order to be eligible for declaratory relief.

As *Younger* and *Steffel* make clear, this Court has long sought to establish a proper and workable balance between concerns for comity and federalism on the one hand and, on the other hand, the need to provide litigants with a federal forum to pursue constitutional claims. When principles of comity and federalism are seriously implicated—as where a state court action *already* is underway—the goal of providing a federal forum yields in significant but not absolute part to those principles. But the balance does not always tip in that direction. *Younger* and *Steffel* draw a clear line between injunctive and declaratory relief, between pending and anticipated proceedings, and between state and federal proceedings. They strongly suggest that the goal of providing a federal forum requires a new balance, and most likely a different result, when the proceeding at issue—as here—is one for declaratory relief from an anticipated federal action.

The decision of the D.C. Circuit ignores both the distinctions drawn by this Court in the cases discussed and this Court's careful attention to the policies and rights that underlie those distinctions. Instead, in two conclusory and perfunctory paragraphs that give no heed whatsoever to the longstanding policy in favor of a federal forum for constitutional claimants, the D.C. Circuit has transformed a limitation on federal court interference in pending state court proceedings into an absolute bar on federal court intervention with federal criminal investigations prior to indictment.[3] Moreover, the D.C. Circuit did not address the injuries alleged in the complaints or what remedy, if any, is available for injuries not remediable by dismissal of an indictment.

To be sure, in many cases such as *Olagues* v. *Russoniello*, *supra*, and *Smith* v. *Meese*, *supra*, separation of powers concerns, like federalism, provide a counterweight to the presumption that federal courts will provide a federal forum for federal claimants. For that reason, *Olagues* and *Smith* considered (but rejected) the separation of powers in determining whether the judicial branch may consider a constitutional challenge to activities of Executive Officers. In this case, however, like concerns are not implicated, and not surprisingly

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[3] Indeed, when Chief Justice Rehnquist denied Mr. Deaver's application for a stay of the D.C. Circuit's ruling, he certainly did not suggest that federal courts may never interfere with federal criminal investigations. Instead, confronted with a complaint for a temporary restraining order and preliminary injunctive relief from a federal prosecution, he stated that the applicant had not "met th[e] burden" of overcoming the "traditional rule that a court of equity will not enjoin a criminal prosecution" and "the presumption that an Act of Congress is constitutional." *Deaver* v. *Seymour*, No. A-677 (March 18, 1987). Even in the case of *injunctive* relief from a *prosecution*, the Chief Justice saw no absolute bar. Yet the D.C. Circuit now has fashioned such an absolute bar, which extends also to declaratory relief from investigative activities.

the D.C. Circuit invoked no such interests. In a case such as this one, where petitioner's claim is that, through the appointment of an independent counsel, the separation of powers is violated by the congressional *removal* from the Executive of powers constitutionally entrusted to it, it would have been farcical to rely on separation of powers principles to preclude a federal forum. Absent a countervailing interest such as the separation of powers, however, there is simply no warrant for foreclosing a federal forum to petitioner.

Moreover, even were the *Younger* line of cases properly applicable to federal court intervention in federal criminal investigations (because of the analogy between federalism and the separation of powers), this case would constitute one of the "extraordinary" circumstances discussed in *Younger* that allow the action to proceed. For one, the separation of powers concerns that might tilt against intervention in the routine case are lacking here. Second, at issue here is the legality of the independent counsel's investigation as a whole. Petitioner's challenge is not merely to its subject matter (which is not strictly implicated until an indictment), but to any and all actions taken by the independent counsel and his staff under color of law. *Younger* made specific allowance for challenges to bad faith or harassing prosecutions, and that exception must surely encompass a challenge to wholly illegal ones. Third, dismissal of an indictment—the only remedy now offered by existing law in the D.C. Circuit—might adequately void the injury flowing from an indictment, but it would not relieve the very different injury flowing from an unconstitutional investigation. Each day, people with intimate knowledge of petitioner's personal and financial life are compelled to disclose information about petitioner to people with no lawful authority whatsoever—simply put, to people who have no business having compelled access to such private information. Furthermore, according to

the complaints, those people who receive the information are violating grand jury secrecy rules by disclosure of this information to which they do not even properly have access. It simply cannot be that courts must close their eyes to federal criminal investigations that are conducted wholly without authority, and that no remedy exists for a person who, although subject to the extraordinary intrusion of such an investigation, is not indicted. The injury alleged by the petitioner is, therefore, irreparable in light of the D.C. Circuit ruling, as the injury from an indictment is not.[4] Thus, for at least these three reasons, even had the D.C. Circuit merely extended the more flexible *Younger* rule, allowing for exceptions in extraordinary circumstances, to federal proceedings rather than imposing an absolute prohibition on civil relief, this case would have fit within the *Younger* exception and would not have required dismissal.

The decision below, establishing a mandatory rule of equitable restraint *requiring* dismissal of a federal action that seeks declaratory or injunctive relief from a federal criminal investigation, expands *Younger*, conflicts with *Steffel*, and, without sound reasoning or analysis, eliminates a federal forum for a wide and significant range of federal claims. Such a broad and unprecedented ruling must not stand absent review by this Court.

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[4] In *Younger*, where there was no claim that the investigation itself was unlawful, this Court had no occasion to consider whether being subject to an unlawful criminal investigation constitutes irreparable injury. The D.C. Circuit erroneously assumes such a holding and premises its entire ruling on such an error.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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Dated: December 30, 1987

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5058

OLIVER L. NORTH,
Appellant

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, et al.

[Filed Oct. 1, 1987]

Before: ROBINSON, SILBERMAN and D. H. GINSBURG, *Circuit Judges*

ORDER

Upon consideration of Appellee's Motion for Summary Affirmance, Appellant's Opposition, and the responses and replies thereto, it is

ORDERED by the court, for the reasons expressed in the accompanying memorandum, that the motion for summary affirmance be granted.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

MEMORANDUM

Appellant Lieutenant Colonel Oliver North has appealed the dismissal by the district court of a civil action whereby North sought to challenge the legality of a pending criminal investigation undertaken by Independent Counsel Lawrence Walsh. Because the dismissal of the complaint was clearly correct, we summarily affirm the order on appeal.

We conclude that Colonel North, like the appellant in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action. It is clear, after *Deaver*, that potential criminal defendants "cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *Id.* at 71. Accordingly, because the order of the district court dismissing the complaint in this case was clearly correct, *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) *cert. denied*, 449 U.S. 994 (1980), we affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5059

OLIVER L. NORTH,
Appellant

v.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES, et al.

[Filed Oct. 1, 1987]

Before: ROBINSON, SILBERMAN and D. H. GINSBURG,
Circuit Judges

ORDER

Upon consideration of Appellee's Motion for Summary Affirmance, Appellant's Opposition, and the responses and replies thereto, it is

ORDERED by the court, for the reasons expressed in the accompanying memorandum, that the motion for summary affirmance be granted.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

MEMORANDUM

Appellant Lieutenant Colonel Oliver North has appealed the dismissal by the district court of a civil action whereby North sought to challenge the legality of a pending criminal investigation undertaken by Independent Counsel Lawrence Walsh. Because the dismissal of the complaint was clearly correct, we summarily affirm the order on appeal.

We conclude that Colonel North, like the appellant in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action. It is clear, after *Deaver*, that potential criminal defendants "cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *Id.* at 71. Accordingly, because the order of the district court dismissing the complaint in this case was clearly correct, *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) *cert. denied*, 449 U.S. 994 (1980), we affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 87-0457
and 87-0626

OLIVER L. NORTH,

Plaintiff,

v.

LAWRENCE E. WALSH, Independent
Counsel and EDWIN MEESE, III,
Attorney General,

Defendants.

[Filed Mar. 12, 1987]

Before THE HONORABLE BARRINGTON D. PARKER,
Senior Judge

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For Defendant Edwin Meese, III:

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For House Speaker and Bipartisan Leadership Group of the House:

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General Counsel to the Clerk
U.S. House of Representatives

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For the U.S. Senate:

MICHAEL DAVIDSON, ESQ.
MORGAN FRANKEL, ESQ.

MEMORANDUM OPINION

Barrington D. Parker, Senior District Judge:

This case, brought by plaintiff Lt. Colonel Oliver L. North, seeks declaratory and injunctive relief against implementation of certain provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) ("Ethics Act" or "Act"). The Ethics Act provides for the appointment of an independent counsel to investigate and prosecute certain members of the Executive Branch of the federal government charged with criminal conduct. The defendants are Lawrence E. Walsh, the Independent Counsel appointed pursuant to the Act, and Edwin Meese, III, the United States Attorney General.

Plaintiff asserts that the Independent Counsel provisions of the Act offend the principle of separation of powers and are thus constitutionally infirm. Because North challenges the validity of an ongoing criminal investigation, which has not resulted in an indictment or criminal prosecution against him or any other person, the Independent Counsel and the Attorney General contend that his constitutional argument should not be considered until the investigation has run its course and an indictment, if any, is returned by a grand jury. In short, they argue that at this time plaintiff's constitutional argument should not be considered. The Court agrees. Defendants' procedural challenges are well taken and the complaint is dismissed. The reasons for that determination are set out in this Opinion.[1]

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[1] This litigation has triggered more than usual interest in the legal community. The Court granted leave to participate as amici curiae to the American Bar Association, Public Citizen, Common Cause, Monroe H. Freedman, former Dean of the Hofstra Law School, and the United States Senate. All filed briefs in support of the constitutionality of the Ethics Act. In addition, leave was

BACKGROUND

The Ethics in Government Act

A.

The independent counsel machinery challenged here was a response to Congress' concern that the Department of Justice had experienced in the past, and would continue to experience, difficulty in investigating and prosecuting members of the Executive Branch. S. Rep. No. 95-170, 95th Cong., 1st Sess. 3 (1977). Thus, the Congress sought to eliminate any potential improprieties stemming from the Executive Branch investigating its own officers. The necessity for such legislation was underscored by the recent events surrounding the Watergate scandal, including the dismissal of Special Prosecutor Archibald Cox by President Nixon. The Senate proposed as early as June of 1974 that a permanent Office of the Public Attorney be established to investigate criminal cases that could lead to potential conflicts of interest within the executive branch. *Final Report of the [Senate] Select Committee on Presidential Campaign Activities*, S. Rep. No. 93-981, 93rd Cong., 2d Sess. 96 (1974). Committees of both the House and the Senate conducted extensive hearings beginning in 1975 and culminating three years later in the enactment of the Ethics Act with its independent counsel provisions.

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granted to the Speaker and the Bipartisan Leadership Group of the United States House of Representatives, under Fed. R. Civ. P. 24.

The House parties are the Honorable Jim Wright, Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives, which includes the Honorable Thomas S. Foley, Majority Leader, the Honorable Robert H. Michel, Minority Leader, the Honorable Tony Coelho, Majority Whip, the Honorable Trent Lott, Minority Whip, and the Honorable Peter W. Rodino, Chairman of the House's Committee on the Judiciary.

The proposed legislation received widespread support from the legal community. While the bills that were to become the Act were being considered by the House and Senate committees,[2] the American Bar Association, professional and public interest groups, and legal scholars expressed their support for the special prosecutor mechanism.[3]

The legislative efforts expended by the Congress finally bore fruit. Differences between the Senate-passed bill and the bill reported to the House were ironed out in conference, and the special prosecutor legislation was signed into law by the President as Title VI of the Ethics in Government Act of 1978.

A reauthorization amendment passed in 1983 postponed expiration of extended the law [sic] for five years. The present law expires on January 2, 1988, and it is anticipated that the Congress will consider this year whether to extend the law and, if so, whether to amend it.

B.

The Ethics in Government Act set in place a procedure for the judicial appointment of an independent counsel to investigate certain members and former members of the

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[2] Similar views were also expressed concerning earlier special prosecutor legislation. *See Special Prosecutor Hearings Before the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973) (views of Prof. Archibald Cox; Prof. Philip B. Kurland; Prof. Raoul Burger; Prof. Paul Freund; Prof. Philip Heyman).

[3] The Justice Department also supported the legislation. John H. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, testified that "on balance we think the extraordinary circumstances which would warrant a resort to a special prosecutor would also justify granting him the measure of independence provided." *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflicts of Interest Matters: Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 15-16 (1977).

Executive Branch. Pub. L. No. 95-521, tit. vi, 92 Stat. 1867-75 (codified as amended at 28 U.S.C. §§ 591-98). The relevant provisions of the statute as applied to this proceeding are briefly summarized.

The Chief Justice assigns three judges to a special division of the United States Court of Appeals for the District of Columbia Circuit, created for the purpose of appointing the Independent Counsel. 28 U.S.C. § 49. Whenever the Attorney General receives information sufficient to constitute grounds to investigate allegations that any person covered under the Act [4] has committed a violation of any federal criminal law other than a petty offense, he shall conduct an investigation of the matter for a period not to exceed ninety days. 28 U.S.C. § 592(a)(1).

If the Attorney General finds reasonable grounds to believe that the matter warrants further investigation or prosecution, he is then required to apply to the special division of the Court for the appointment of an independent counsel and to provide sufficient information to assist in selecting the independent counsel and in defining his prosecutorial jurisdiction. 28 U.S.C. § 592(c)(1), 592(d)(1). Upon receipt of such application, the special division shall then appoint an appropriate independent counsel and define his prosecutorial mandate. 28 U.S.C. § 593(b).

The independent counsel enjoys full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General. 28 U.S.C. § 594(a). His investigative and prosecutorial functions are broad and authorize him to conduct proceedings before grand juries

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[4] Persons covered under the Act are those enumerated in 28 U.S.C. § 591(b) and (c), the investigation of whose activities is presumed or found to create conflicts of interest or the appearance thereof. *See* S. Rep. No. 95-170, 95th Cong., 1st Sess. 53 (1977).

and other investigations; participate in court proceedings and engage in litigation where necessary; determine whether to contest assertions of testimonial privileges; apply for grants of immunity for any witness, or for warrants, subpoenas, or other court orders; inspect, obtain, or use tax returns; frame and sign indictments, file informations, and handle all aspects of any case in the name of the United States. *Id.*

The independent counsel may request assistance from the Department of Justice and secure any of its records, files or other materials relevant to matters within his prosecutorial jurisdiction. 28 U.S.C. § 594(d). He is required to comply with the written or other established policies of the Department regarding criminal law enforcement where possible,[5] and has full authority to dismiss matters within his jurisdiction at any time prior to prosecution, if to do so would be consistent with such policies. 28 U.S.C. § 594(f), (g). If he should determine that any matter within his jurisdiction does not warrant prosecution, he must report to the appointing court the reasons for that determination. 28 U.S.C. § 595(b).

The independent counsel may be removed only for cause by the Attorney General, who must then report to the appointing court and to Congress the specific reasons for the removal. 28 U.S.C. § 596(a)(1), (2). If so removed, he may seek judicial review of that action before the appointing court and may obtain reinstatement if the removal was based upon an error of fact or law. 28 U.S.C. § 596(a)(3).

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[5] As originally enacted, the Act only required the Independent Counsel to comply with Justice Department policies "to the extent that [he] deems appropriate." In amending § 594(f) Congress sought to place the special prosecutor function more closely in line with that of Justice Department investigators. *See* B. Civilletti, *Post Watergate Legislation in Retrospect*, 34 Sw. L.J. 1043 (1981).

The Investigation

On December 4, 1986, defendant Attorney General Meese applied for the appointment of an Independent Counsel to investigate whether violations of federal criminal law were committed in the transfer of arms to Iran and in the disposition of the proceeds from that transfer. Plaintiff North and other government officials were allegedly involved in such activities. North had earlier been a staff member of the National Security Council; he was removed from that assignment in late November. On December 19, 1986, Walsh was appointed as Independent Counsel to investigate possible violations of federal criminal laws by North, or by others acting in concert with North, from 1984 to the present.

Investigation of Lt. Colonel North was authorized by § 591(c) of the Act. That section provides in part that "the Attorney General may conduct an investigation and apply for an independent counsel . . . if [he] determines that investigation of [a] person [not covered under § 591(a) or (b)] by the Attorney General or other officer of the Department of Justice may result *in a personal, financial or political conflict of interest.*" (emphasis added)

Since his appointment, Mr. Walsh has pursued the investigation with the diligence expected. A grand jury was empaneled on January 28, 1987. Walsh has served numerous subpoenas and has explored various aspects of North's operations. The media has reported that immunity was granted to one or more persons to secure their testimony.

The Present Litigation

On February 24, 1987, North filed a complaint broadly challenging the investigation and seeking equitable relief against the Independent Counsel and the Attorney General. In response, on March 2, defendant Walsh filed a

motion to dismiss the complaint, asserting first, that plaintiff's action constitutes an impermissible collateral attack upon an ongoing criminal investigation; second, that the claims presented are premature and not ripe for adjudication; and lastly, that the Independent Counsel provisions of the Act are constitutional. The Attorney General has similarly filed a motion to dismiss. He joins in Walsh's procedural arguments and, in addition, maintains that plaintiff lacks standing to challenge the Act's constitutionality.

Meanwhile on March 5, 1987, the Attorney General promulgated a new regulation, 28 C.F.R. §§ 600.1 *et seq.*, establishing an Office of Independent Counsel: Iran/Contra. He announced that his action was undertaken with the proper statutory authority[6] and with the full support of the President. He noted specifically that because of the constitutional challenges asserted in the pending lawsuit, he "found it advisable to assure the courts, Congress, and the American people that this investigation [would] proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the *North* litigation." At the same time that the regulation was announced, Attorney General Meese appointed Walsh as Independent Counsel within the Department of Justice. Thereafter, in prompt response, on March 6, 1987, North's counsel filed a new complaint in this Court, Civil Action No. 87-0626, against Meese and Walsh charging that the enabling regulation promulgated by the Attorney General was "rife with constitutional and statutory infirmities."

On the morning of March 9, 1987, the Independent Counsel filed a motion to dismiss the new complaint. At

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[6] 28 U.S.C. §§ 509, 510, 515 (delegation of authority by Attorney General); 5 U.S.C. § 301 (authorizes Heads of Departments to promulgate regulations for the government of their Departments).

the hearing on defendants' earlier motions to dismiss held later that day, all parties agreed to argue the procedural issues presented by both complaints. Accordingly, the motions hearing of March 9, 1987, which was initially scheduled to consider only a motion to dismiss in the first complaint, was by agreement among the parties extended to consider the procedural issues presented in both complaints.

ANALYSIS

It is black letter law that before this Court may exercise jurisdiction over plaintiff North's substantive challenge to the constitutionality of the Ethics in Government Act, he must present a justiciable "case or controversy." Defendants have argued that, for a variety of reasons, plaintiff has failed to do just that. They raise two crucial threshold questions. First, does plaintiff allege a "distinct and palpable injury" sufficient to confer standing? Second, does plaintiff present a controversy ripe for review?

After careful consideration of the parties' memoranda, and the oral argument of counsel at the March 9, 1987, hearing, this Court concludes that plaintiff has not alleged a sufficient hardship to meet the ripeness standard and to warrant anticipatory judicial involvement in the ongoing criminal investigation. Therefore, the Court need not reach the question of whether plaintiff has standing.

The threshold procedural question presented is whether North's constitutional claims are ripe for adjudication at this time. In analyzing whether plaintiff's claims are ripe, the Court must address two factors. First, as a matter of constitutional importance, the Court must evaluate "the fitness of the issue for judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Second, the Court must consider "the hardship to the parties of withholding court consideration." *Id.*

A.

Constitutional Considerations

Plaintiff's constitutional challenge to the Ethics in Government Act meets the first prong of the *Abbott Laboratories* test. He raises purely legal issues, challenging Congress' power to establish the Office of Independent Counsel as a prosecuting arm insulated from the control of the Executive Branch. He argues that the authority to prosecute the law vests exclusively in the Executive Branch. Any official who exercises prosecutorial powers must, accordingly, be appointed by the Executive and be removable at his unfettered discretion.

Plaintiff's complaint raises fundamental issues concerning the doctrine of separation of powers, issues which do not require the development of a factual record. His challenge strikes at the core of Walsh's authority to conduct a criminal investigation. The heart of his quarrel is with the very existence of the Office of Independent Counsel, not with the way the Independent Counsel has chosen to proceed with the investigation.[7] Whether or not defendant Walsh enters an indictment against North has no bearing on a challenge to the constitutional infirmities of the Act. The issues surrounding this challenge present a "case or controversy" sufficiently concrete to meet the first prong of the ripeness test. *See Atlantic Richfield Co.* v. *U.S. Dep't of Energy*, 769 F.2d 771, 783 (D.C. Cir. 1984) ("ARCO").

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[7] Plaintiff makes ancillary challenges to the scope of the Independent Counsel's authority. He contends that the Counsel's power to investigate subject areas which touch upon foreign affairs and national security matters invade an exclusively executive sphere. However, until the Independent Counsel utilizes his powers to "intrude" into these fields, plaintiff's claims remain completely speculative. As such, they do not meet even the constitutional requirements for ripeness.

B.

Prudential Considerations

The second prong of the ripeness test raises prudential concerns and requires the Court to assess, in light of the "totality of the circumstances," whether the hardship to the parties of withholding consideration warrants immediate judicial review. *ARCO*, 769 F.2d at 783. Both plaintiff's challenge to the constitutionality of the statute, and the relief requested to enjoin the criminal investigation, persuade the Court to stay its hand and not to proceed with a consideration of the merits of plaintiff's claim.

1. Judicial Self-Restraint

It is established judicial doctrine that courts should exercise self-restraint when confronted with constitutional issues. *E.g., Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (1936). (Brandeis, J., concurring). This case presents issues of particularly grave constitutional importance. North's arguments do not merely challenge the legality of the Office of Independent Counsel. His rather doctrinaire approach to separation of powers issues would require the Executive to reserve all prosecutorial powers for itself. Such a requirement would call into question the constitutionality of vesting prosecutorial power in independent agencies and other institutions. Therefore, in finding that plaintiff's claim is not ripe for review, the Court heeds the sage words of Judge Harold Leventhal:

> [W]e should be particularly mindful of that policy when we are asked to delineate, as we are in this case, the respective powers and duties of the major branches of government. That kind of broad issue enhances the general temptation of a record lacking concrete detail, toward abstractness in analysis and

broad pronouncements unsuited to the subtle workings of our constitutional system.

Clark v. *Valeo*, 559 F.2d 642, 662 (1977). (Leventhal, J., concurring.)

2. Judicial Policy Against Enjoining Criminal Investigations

The strong policy against intervening in ongoing criminal investigations also persuades the court to refrain from reviewing plaintiff's substantive claim. Courts have almost never found that an ongoing criminal investigation imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment. The standard for obtaining any form of injunctive relief is high, *Younger* v. *Harris*, 401 U.S. 37, 46 (1970), but a party who seeks to enjoin a criminal investigation has a particularly heavy burden. Our Court of Appeals in denying such equitable relief ruled that "only the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations." *Reporters Committee* v. *American Telephone and Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978) (reporters constitutional rights to free speech found insufficient to require advance notice for purposes of challenging third party releases of reporters' billing records to criminal investigation).

The Supreme Court has routinely rejected collateral challenges which impede ongoing criminal investigations. In the leading authority of *United States* v. *Blair*, 250 U.S. 273 (1919), subpoenaed witnesses refused to appear before the grand jury, contending that the law which the grand jury was enforcing, the Federal Corrupt Practices Act, was unconstitutional. The Court ordered the witnesses to testify, ruling that "an individual is not entitled to challenge the authority of the grand jury, provided they have a de facto existence and organiza-

tion." *Id.* 280.[8] In this proceeding, plaintiff levies constitutional challenges against Walsh's position as Independent Counsel. But Walsh has de facto authority and his office "de facto existence." Defendant Walsh was appointed and is acting pursuant to a law enacted by Congress and signed by the President, a law which carries the presumption of constitutionality.[9]

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[8] *See also, e.g.*, United States v. Dionisio, 410 U.S. 1 (1972) (witnesses required to provide voice exemplars to duly constituted grand jury despite claim that evidence was obtained through illegal search and seizure); United States v. Calandra, 414 U.S. 338 (1974) (witness cannot invoke exclusionary rule to avoid testifying before grand jury); United States v. A.W.J., 639 F. Supp. 1558 (D. Minn. 1986) (juvenile's motion to stay the conversion of juvenile proceeding in adult criminal prosecution denied as interfering with criminal investigation); Larouch v. Webster, 566 F. Supp. 415 (S.D. N.Y. 1983) (courts will not enjoin a criminal investigation undertaken in good faith); Matter of Doe, 546 F.2d 498 (2d Cir. 1976) (claim that subpoena issued to target's investigation exceeded grand jury's investigative powers properly raised at trial on the merits); In re Grand Jury Proceedings, 525 F.2d 151 (3rd Cir. 1975) (claim that identical action proceeding before state court inadequate to sustain an indefinite state of federal grand jury investigation).

[9] Although a careful look at the constitutionality of the Act must await a time when plaintiff has alleged a concrete injury, defendant Walsh has offered good reasons to believe that the Act will be upheld. Plaintiff's rigid vision of the separation of powers doctrine is not supported by our constitutional structure of government. The Constitution explicitly intermingles the traditional functions of government to guard against abuses of power and conflicts of interest. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976); U.S. Constitution art. I § 2 and art. II § 4. Nor is his interpretation supported by Supreme Court jurisprudence. In both Bowsher v. Synar, 106 S. Ct. 318 (1986) and INS v. Chadha, 462 U.S. 919 (1983), the court struck down legislation where Congress usurped Executive functions for itself. It concluded that the separation of powers doctrine forbids one branch of government from acting as both a lawmaker and an executor at the same time. But as the Court stated in Nixon v. Administrator of General Services, 433 U.S. 425, 442 (1983), the doctrine does not mandate "airtight

The rationale behind the judicial policy against intervening in a criminal investigation is threefold. First, the courts want to protect the public's interest in the fair and expeditious enforcement of the criminal laws. Permitting challenges at the pre-indictment stage would impede the criminal investigation by "saddling the grand jury with minitrials and preliminary showings." *U.S.* v. *Dionisio*, 410 U.S. 1, 17-18 (1972). Second, the courts seek to balance the defendant's need to assert his rights against the judiciary's interest in conserving its resources. The criminal justice system is structured to provide the criminal defendant ample opportunity to vindicate his rights *after* he is indicted. *See* Fed. R. Crim. Proc. 12(b). Finally, principles of comity and separation of powers counsel courts against intervening in a criminal investigation conducted by another branch of government. *See Reporters Committee* v. *AT&T*, 593

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departments of government." It explicitly repudiated plaintiff's antiquated position stating "a hermetic sealing off of the three branches of government would preclude the establishment of a nation governing itself effectively." Buckley v. Valeo, 424 U.S. at 121.

The Ethics in Government Act was enacted to ensure that our government continues to govern itself effectively. Neither Congress nor the courts appropriated powers to themselves at the expense of the Executive Branch. The Act places a check on complete Executive discretion in conducting prosecutions only when conflicts of interest exist within the Executive Branch. It prevents potential improprieties arising out of having the Executive retain complete control over the investigations of his closest associates. The very purpose of the office requires a degree of independence from Presidential control.

In short, the Ethics Act is a "modest, narrowly drawn prophylactic . . . measure" which should not be struck down under any "crabbed interpretation" of the separation of powers doctrine. Banzhaf v. Smith, 588 F. Supp. 1498, 1508 (D.D.C. 1984), *rev'd on other grounds*, 737 F.2d 1167 (D.C. Cir. 1984). *See also* Deaver v. Seymour, C.A. No. 87-0477, slip op. at 4-5 (D.D.C. Mar. 11, 1987) (statute most likely constitutional).

F.2d at 1065. Ironically, enough, the very doctrine plaintiff invokes to strike down the Ethics in Government Act persuades the Court against addressing his claim on the merits.

Plaintiff attempts to distinguish the wealth of precedent against intervention in criminal proceedings on the grounds that his challenge strikes at the very authority of the investigative body to investigate, rather than at specific actions undertaken by it. Though plaintiff's distinction has some merit,[10] it has been explicitly rejected by our Circuit in *Hastings* v. *Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 3272 (1986). In strikingly parallel circumstances, Judge Hastings challenged the core authority of a committee of judges established by statute to

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[10] The court would be more inclined to enjoin prosecution conducted by an unauthorized private citizen who had all the coercive investigatory and prosecutorial powers of the government at his or her disposal. However, defendant Walsh is not such a "vigilante" as plaintiff alleges. *See* Transcript of Proceedings (Mar. 9, 1987) at 52. He is an Independent Counsel duly appointed pursuant to the Ethics in Government Act. Nor are his powers "unlimited." His powers are carefully circumscribed by the Act itself. The scope of his jurisdiction is narrowly defined by a special panel of judges, 28 U.S.C. § 593(b). He is required to comply with the written policies of the Justice Department unless not possible. *Id.* § 594(f). Furthermore, the statute renders the Independent Counsel ultimately responsible to the Executive Branch. The Executive Branch initiates the appointment of the Independent Counsel if the Attorney General finds "reasonable grounds" to believe that an investigation is warranted. *Id.* § 592(c)(1). If the Attorney General determines that the allegations are not grounded in sufficient facts to warrant further investigation, he must notify the appropriate court and the inquiry terminates. *Id.* § 592(b)(1). Finally, the Attorney General is the only authority vested with the power to remove the independent counsel if he finds "good cause" to do so. *Id.* § 596(a)(1). These provisions restrict the Independent Counsel from becoming the overzealous prosecutor plaintiff fears.

investigate wrongdoing allegedly committed by members of the Judiciary. He argued that judges cannot exercise the powers of investigation and prosecution. These powers, he claimed, were prosecutorial tools vested in the Executive Branch. Despite Judge Hastings' challenge to the very authority of the investigating body, our Circuit refused to consider the constitutionality of the investigation. The Court concluded that his failure to show "a serious and irremediable injury" precluded "disruptive injunctive relief by federal courts." *Id.* at 1102.

Judge Hastings presented a stronger case for intervention than the one here. Because the investigation of Judge Hastings was a civil, not criminal, proceeding the court was less troubled by its possible interruption. Moreover, the injury to Judge Hastings resulting from being the subject of an allegedly unduly constituted investigation was both far greater than that faced by plaintiff here and more readily redressable. His investigation could have resulted in his impeachment. However, if the court were to have enjoined that investigation, he would have been free from any other investigation.[11] By contrast, the relief that plaintiff North seeks would not preclude alternative criminal investigations. In fact, at oral argument, plaintiff conceded that the United States Attorney would have authority to lead the investigation against him. Transcript of Proceedings (Mar. 9, 1987) at 68. Thus, plaintiff's only claim of injury is that he is the subject of an investigation which is headed by a public official who is, he alleges, without that authority. This "injury" does not rise to the level of concrete hardship warranting judicial review at this time.[12]

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[11] Acquittal following a prior criminal proceeding precluded any further criminal prosecution.

[12] Plaintiff asserts that he suffers further injury because defendant Walsh might handle the investigation differently than one

North does not cite a single case in which an ongoing criminal investigation was halted to support his claim for extraordinary relief.[13] Plaintiff's sole support for his position is a civil case in the Eleventh Circuit, *In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986), *cert. denied*, 106 S. Ct. 3273 (1986). There the Eleventh Circuit adjudicated the merits of Judge Hastings constitutional challenges to the Judicial Conduct statute which our Circuit concluded were unripe one year earlier. Subsequent to our Circuit's decision, the committee subpoenaed the Judge's law clerks and secretary. They refused to appear before the committee arguing that the Judiciary did not have the power to investigate and prosecute. Finding that the law clerks had "surrogate" standing to present Judge Hastings' constitutional claims, the court proceeded to the merits. When the sub-

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handled under the auspices of the Department of Justice. However, as noted earlier, the Act requires the Independent Counsel to act in accordance with the Department of Justice policies. Therefore North is being investigated according to the same standards that a Justice Department officer would investigate any other person. His claim implies that an investigation conducted under the auspices of the Justice Department would be undertaken with less vigor. As such it illustrates the precise need for an independent counsel who is not beholden to the Executive Branch.

[13] The rule against enjoining a criminal investigation for abuses of authority is not absolute. When parties challenge instances of egregious prosecutorial misconduct, courts have enjoined criminal investigations. *See* Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986) (collection of list of voters who requested bilingual ballots by United States Attorney to investigate voter fraud impermissibly chills the right to vote; that harm is egregious enough to enjoin the investigation). However the Court concludes that the injury to plaintiffs alleged in *Olagues*—that a citizen's right to vote would be chilled—is far more serious than the injury to plaintiff North.

poenaed witness called into question the constitutional legitimacy of the investigating body, the court concluded "it seems only reasonable that we should decide whether the very existence of the committee for its assigned purposes violates the Constitution before allowing the committee to intrude upon confidential communications." *Id.* at 1501. However, the Eleventh Circuit did not rely on any precedent to justify reaching the appellant's constitutional challenge before the termination of the investigation. In fact they admitted "the answer is not free from doubt." *Id.* at 1502. Taken alone, this opinion by the Eleventh Circuit is a weak reed upon which to support the extraordinary relief plaintiff requests. In light of our own Circuit's rejection of the reasoning subsequently adopted by the Eleventh Circuit, the Court finds no reason to grant the extraordinary relief he seeks.[14] Colonel North, like any other potential criminal defendant, can raise his objections by appropriate motions, *if* and *when* an indictment is entered.

CONCLUSION

The Nation demands an expeditious and complete disclosure of our government's involvement in the Iran/Contra affair. In serving this important public interest, the Independent Counsel is pursuing the investigation energetically and responsibly. The Executive Branch has spoken out in support of the vigorous and comprehensive investigation conducted by Walsh and has bestowed upon him a dual position within the Executive Branch to ensure that the investigation continues unimpeded. De-

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[14] It should be noted that the claims before the Eleventh Circuit involved the assertion of testimonial privileges the abrogation of which would necessarily have resulted in immediate harm.

In this proceeding, neither plaintiff North nor anyone in privity with him has asserted any constitutional, statutory or common law privilege.

spite this concerted effort by all to ensure that the investigation proceeds with dispatch, plaintiff North filed two actions seeking extraordinary injunctive relief. He asks the Court to intercede and to halt the investigation in its tracks.

The Court need not and should not hear plaintiff's challenges at this time. The plaintiff has not suffered an injury of sufficient keenness to warrant the Court's intercession. For that reason, the Court finds that plaintiff's challenge to the constitutionality of the independent counsel machinery is not ripe for adjudication and that his complaints should be dismissed.

An appropriate Order will be entered.

Entered: March 12, 1987

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 87-0457 and 87-0626

OLIVER L. NORTH,

Plaintiff,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL and EDWIN MEESE, III, ATTORNEY GENERAL,

Defendants.

[Filed Mar. 12, 1987]

ORDER DISMISSING COMPLAINTS

The Court has filed on this date a Memorandum Opinion addressing the motions of defendants Lawrence E. Walsh and Edwin Meese, III to dismiss the complaint in the above cases and setting forth reasons in support of its conclusions. On basis thereof it is this 12th day of March, 1987,

ORDERED

That the defendants' motions to dismiss both complaints are granted and the plaintiff's complaints are hereby dismissed.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. ———

OLIVER L. NORTH,
703 Kentland Drive,
Great Falls, Virginia,
Plaintiff,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

and

EDWIN MEESE III, ATTORNEY GENERAL,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT THAT THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE UNCONSTITUTIONAL AND FOR INJUNCTIVE RELIEF

I.

JURISDICTION

1. This is an action arising under the Constitution and laws of the United States against officers of the United States acting in their official capacity or under color of legal authority. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331. This Court is authorized to grant a declaratory judgment and such other

relief as may be proper by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

II.

VENUE

2. This is a civil action against officers of the United States acting in their official capacity or under color of legal authority. The cause of action arises in the District of Columbia, as is hereinafter set out, within the meaning of 28 U.S.C. § 1391(e)(2), and venue properly lies in the District of Columbia.

III.

THE PARTIES

3. Plaintiff LtCol Oliver L. North resides at 703 Kentland Drive, Great Falls, Virginia.

4. Defendant Lawrence E. Walsh is a private attorney purporting to act as independent counsel pursuant to 28 U.S.C. § 591 *et seq.* On December 19, 1986, the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit entered an order purportedly authorizing Mr. Walsh to investigate allegations regarding, and prosecute charges against, plaintiff North and other unnamed government and private individuals, and to exercise all functions of the Attorney General of the United States and the United States Department of Justice for these purposes.

5. Defendant Edwin Meese III is Attorney General of the United States.

IV.

ETHICS IN GOVERNMENT ACT

6. The Ethics in Government Act of 1978 ("the Act"), 28 U.S.C. § 591 *et seq.*, creates a mechanism for

the judicial appointment of an independent counsel to investigate certain members and former members of the Executive Branch and certain officers of the President's national campaign committee.

7. Under the Act, the Chief Justice must designate and assign three judges or justices to a division of the United States Court of Appeals for the District of Columbia created for the purpose of appointing the independent counsel. 28 U.S.C. § 49.

8. Under 28 U.S.C. § 591(a), whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in § 591(b) has committed a violation of any Federal criminal law other than a petty offense, he shall conduct an investigation of the matter for a period not to exceed ninety (90) days.

9. Under 28 U.S.C. § 591(c), whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in § 591(b) has committed a violation of any Federal criminal law other than a petty offense, the Attorney General may conduct an investigation for a period not to exceed ninety (90) days and apply for an independent counsel if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.

10. If the Attorney General finds reasonable grounds to believe that the matter warrants further investigation or prosecution, or if ninety (90) days elapse from the receipt of the information without a determination that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall apply to the division of the court for the appointment of an independent counsel and provide suf-

ficient information to assist the court in selecting the independent counsel and defining his prosecutorial jurisdiction. 28 U.S.C. §§ 592(c)(1), 592(d)(1).

11. Upon receipt of an application from the Attorney General, the division of the court shall appoint an appropriate independent counsel and shall define his prosecutorial jurisdiction. 28 U.S.C. § 593(b).

12. The division of the court may not appoint any person who holds or recently held any office of profit or trust under the United States. 28 U.S.C. § 593(d).

13. Upon appointment, the independent counsel purportedly enjoys, with respect to all matters in his prosecutorial jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except for those matters specifically requiring the Attorney General's personal action under 18 U.S.C. § 2516. 28 U.S.C. § 594(a).

14. The purported investigative and prosecutorial functions of the independent counsel include (a) conducting proceedings before grand juries and other investigations; (b) participating in court proceedings and engaging in any litigation deemed necessary, including civil and criminal matters; (c) appealing any decision of a court in any case or proceeding in which he acts in his official capacity; (d) reviewing documentary evidence; (e) determining whether to contest assertions of testimonial privileges; (f) receiving appropriate national security clearances and, if necessary, contesting any claim of privilege or attempt to withhold evidence on national security grounds; (g) applying for grants of immunity for any witness, or for warrants, subpoenas, or other court orders; (h) inspecting, obtaining, or using tax returns; (i) initiating and conducting pros-

ecutions, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; (j) consulting with the United States Attorney for the district in which the violation was alleged to occur. 28 U.S.C. § 594(a).

15. The independent counsel purportedly has the power to appoint, fix the compensation, and assign the duties of such employees as he deems necessary to carry out the duties of his office. 28 U.S.C. § 594(c).

16. The independent counsel may request, and the Department of Justice purportedly must provide, assistance, including access to any records, files or other materials relevant to matters within the independent counsel's prosecutorial jurisdiction, and also including such resources and personnel as are necessary. 28 U.S.C. § 594(d).

17. Except where not possible, the independent counsel purportedly must comply with the written or other established policies of the Department of Justice regarding criminal law enforcement, and shall have full authority to dismiss matters within his jurisdiction at any time prior to prosecution if to do so would be consistent with such policies. 28 U.S.C. § 594(f), (g).

18. Congress purports to retain significant control over the independent counsel under the Act. The independent counsel shall send periodic reports to Congress on his activities, which he may make public; the appropriate congressional committees shall have oversight jurisdiction with respect to the independent counsel's official conduct, and the independent counsel has the duty to cooperate with the exercise of such oversight jurisdiction; the independent counsel shall advise the House of Representatives of any substantial and credible information he receives that might constitute grounds for impeachment. 28 U.S.C. § 595(a), (c), (d).

19. Before the termination of his office, the independent counsel shall submit to the division of the court a report setting forth fully and completely a description of his work, including the disposition of all cases brought, and the reasons for not prosecuting any matter within his prosecutorial jurisdiction. 28 U.S.C. § 595(b)(1), (2).

20. The division of the court may release to appropriate persons any portions of the independent counsel's report. 28 U.S.C. § 595(b)(3).

21. An independent counsel appointed by the division of the court may not be removed from office, other than by impeachment and conviction, except by the personal action of the Attorney General; the Attorney General may remove the independent counsel only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the independent counsel's duties. 28 U.S.C. § 596(a)(1).

22. Upon removal of the independent counsel, the Attorney General must make a report to the division of the court and to appropriate congressional committees specifying the facts found and the ultimate grounds for removal. The committees must make the report public with some defined exceptions. 28 U.S.C. § 596(a)(2).

23. On removal, the independent counsel may obtain judicial review of the removal in a civil action commenced before the division of the court. 28 U.S.C. § 596(a)(3).

24. If the division of the court determines that the removal of the independent counsel was based on error of law or fact, the independent counsel may obtain reinstatement or other appropriate relief. 28 U.S.C. § 596(a)(3).

25. Whenever a matter is within the prosecutorial jurisdiction of an independent counsel or has been ac-

cepted by the independent counsel, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matters, except to the extent requested by the independent counsel to assist him, and except insofar as any investigation or prosecution is authorized in writing by the independent counsel. 28 U.S.C. § 597(a).

V.

APPLICATION OF THE ATTORNEY GENERAL

26. On or before December 4, 1986, acting pursuant to 28 U.S.C. § 592(c)(1), defendant Meese applied to the division of the court for the appointment of an independent counsel to investigate whether violations of federal criminal law were committed by plaintiff North, other United States Government officials, or other individuals acting in concert with plaintiff North or with other United States Government officials, from in or around 1985 to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment.

VI.

ACTIONS OF THE DIVISION OF THE COURT

27. On December 4, 1986, Senior Circuit Judges MacKinnon, Morgan and Mansfield constituted the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit, sitting in the District of Columbia.

28. On December 19, 1986, the division of the court, sitting in the District of Columbia, issued an Order appointing defendant Walsh as independent counsel.

29. On December 19, 1986, the division of the court purported to empower defendant Walsh to conduct an in-

vestigation significantly broader in scope than that requested by the Attorney General of the United States in his application of December 4, 1986.

30. The division of the court purported to empower defendant Walsh to investigate, to the maximum extent authorized by 28 U.S.C. § 594, whether any person or group of persons described in 28 U.S.C. § 591, including LtCol Oliver L. North, other United States government officials, or other individuals or organizations acting in concert with LtCol North, or with other United States Government officials, has committed a violation of any federal criminal law (other than a petty offense), relating in any way to

(1) The direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) The direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or person acting, or purporting to act as an intermediary in any transaction above referred to in Section (1);

(3) The financing or funding of any direct or indirect sale, shipment or transfer referred to in Section (1) or (2);

(4) The diversion of the proceeds from any transaction described in Section (1) or (2) to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) The provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

31. On December 19, 1986, the division of the court, sitting in the District of Columbia, further purported to empower defendant Walsh to investigate other allegations or evidence of violation of any federal criminal law by plaintiff North, and any person or entity previously referred to in its Order, developed during defendant Walsh's investigation, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

32. Plaintiff North is the only named subject of the criminal investigation commenced on December 19, 1986, and continuing through this date.

33. On December 19, 1986, the division of the court, sitting in the District of Columbia, further purported to empower defendant Walsh to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the federal criminal laws, in connection with the investigation authorized by the court's Order.

VII.

ACTIONS OF THE INDEPENDENT COUNSEL

34. Between December 19, 1986, and the present, defendant Walsh established the Office of Independent Counsel at the United States Courthouse, Room 4434, Washington, D.C. 20001, from which he is actively investigating plaintiff North and other individuals.

35. Between December 19, 1986, and the present, defendant Walsh purported to appoint at least nineteen attorneys to act as associate counsel and assist in the investigation of plaintiff North and other individuals; each of these nineteen attorney-appointees purports to be currently employed by the Office of Independent Counsel. Mr. Walsh is reported to have declined to comment on the "individualized arrangements" into which he has entered with these attorneys.

36. On January 28, 1987, Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia impaneled a federal grand jury in the District of Columbia as part of defendant Walsh's investigation of plaintiff North. The grand jury has the power to subpoena witnesses and documents as part of defendant Walsh's investigation and to return indictments charging violations of criminal laws.

37. Between January 28, 1987 and the present, defendant Walsh and one or more of his associate counsel, purporting to act in the name of the United States, have caused to be issued and thereafter served subpoenas issued by the federal grand jury for the District of Columbia, in furtherance of the investigation of plaintiff North.

38. Between December 19, 1986 and the present, defendant Walsh and one or more of his associate counsel, purporting to act in the name of the United States, entered into cooperation agreements with or granted immunity to one or more witnesses, in order to obtain information for their investigation of plaintiff North.

39. On information and belief, between December 19, 1986 and the present, defendant Walsh has sought and received from the Department of Justice, with the acquiescence of defendant Meese, the assistance of numerous employees and agents of the Department of Justice,

who currently are aiding the independent counsel in the conduct of his investigation of plaintiff North.

40. On information and belief, between December 19, 1986 and the present, defendant Walsh wrote to investigating committees of both Houses of Congress emphatically insisting that they not grant immunity to plaintiff North until the investigation of the independent counsel terminates, because immunity would "create a serious and perhaps insurmountable barrier to the prosecution of these witnesses."

41. On information and belief, between December 19, 1986 and the present, defendant Walsh and one or more of his associate counsel purported to conduct investigations on foreign soil and of foreign individuals, in furtherance of their investigation of plaintiff North.

42. On information and belief, between December 19, 1986 and the present, persons purportedly privy to confidential matters learned in the course of the independent counsel's investigation have disclosed to members of the media allegations concerning plaintiff North.

43. Beginning on December 19, 1986, and continuing through the present, defendant Walsh, defendant Meese, officers, agents and employees of the Office of Independent Counsel acting under and in combination with defendant Walsh, and officers, agents and employees of the Department of Justice assisting the independent counsel, have been conducting and continue to conduct an active investigation into the activities of plaintiff North and other individuals, as purportedly authorized by the December 19, 1986 Order of the division of the court.

VIII.

THE CLAIM

44. The Constitution vests the Executive Power in the President (Article II, § 1).

45. Under the Constitution, the President shall take care that the laws be faithfully executed. (Article II, § 3).

46. Under the Constitution, the function of prosecuting offenses against the United States belongs exclusively to the Executive.

47. In his capacity as independent counsel, defendant Walsh purports to have the power to investigate and prosecute offenses against the United States and is, thereby, exercising an exclusively Executive function.

48. In his capacity as independent counsel, Defendant Walsh is purporting to act as an Officer of the United States, within the meaning of Article II, § 2 of the Constitution.

49. The Act, and the appointment of defendant Walsh thereunder, violate the Constitution because an Officer exercising the powers entrusted to defendant Walsh by the division of the court must be appointed by the President with the advice and consent of the Senate, and defendant Walsh was not so appointed.

50. The Act, and the appointment of defendant Walsh thereunder, violate the Constitution because, even if the independent counsel is an "inferior Officer" within the meaning of Article II, § 2, he was not appointed by the President or a Department Head, as is constitutionally required.

51. The Act, and defendant Walsh's appointment thereunder of associate counsel in the Office of Independent Counsel, violate the Constitution because the associate counsel are "inferior Officers" within the meaning of Article II, § 2, but were not appointed by the President (with or without the advice and consent of the Senate) or by a Department Head, as is required by the Constitution.

52. The Act, and defendant Walsh's appointment thereunder, violate the Constitution and the separation of powers principles inherent in it because the independent counsel is not removable at will by the President or by the Attorney General.

53. The Act, and defendant Walsh's appointment thereunder, violate the Constitution and the separation of powers principles inherent in it because the division of the court intrudes itself into the Executive's removal decision, in that it may review and reverse the decision of the Attorney General to remove the independent counsel from office.

54. The Act, and defendant Walsh's appointment thereunder, violate the Constitution and the separation of powers principles inherent in it because Congress intrudes itself into the Executive's removal decision, in that the Attorney General must justify to Congress any removal decision he makes.

55. The Act, and defendant Walsh's appointment thereunder, violate the Constitution and the separation of powers principles inherent in it because the President's power to remove the independent counsel is restricted.

56. The Act, and defendant Walsh's appointment thereunder, violate the Constitution and the separation of powers principles inherent in it because of the combined effect of the Act's appointment provisions, removal provisions, investiture of Executive power in the independent counsel and the division of the court and Congress, and divestiture of the power of the Executive.

57. The Act, and the delegation of duties to the division of the court thereunder, violate the Constitution because the duties conferred on the division of the court, including the power to appoint, the power to define in-

vestigative and prosecutorial jurisdiction, and the power to review a removal decision, are not within the judicial power of an Article III court, and the division of the court's exercise thereof violates Article III.

58. The Act, and defendant Walsh's appointment thereunder, violate the Constitution and the separation of powers principles inherent in it by divesting the President, the Attorney General and the Department of Justice of power and authority constitutionally entrusted to them, including the power to prosecute offenses against the United States.

59. Pursuant to the Act and the December 19, 1986, Order, defendants Walsh and Meese, all officers, agents and employees of the Office of Independent Counsel, and all officers, agents and employees of the Department of Justice assisting Independent Counsel Walsh, are actively exercising or assisting in the exercise of Executive functions and powers directed against plaintiff in violation of Articles II and III and the separation of powers principles embodied in the United States Constitution.

60. All actions of the independent counsel and the officers, agents and employees of the Office of Independent Counsel, including all actions of the associate counsel, taken in the name of the United States, are unconstitutional.

61. The assistance provided to the independent counsel or the Office of Independent Counsel by the Department of Justice pursuant to the Act is unconstitutional.

62. Plaintiff is continuously and directly subject to and affected by all purportedly official activities of the independent counsel and his staff.

63. The independent counsel provisions of the Ethics in Government Act are unconstitutional.

WHEREFORE, plaintiff requests

1. That this Court issue judgment declaring that the independent counsel provisions of the Act violate the Constitution of the United States.

2. That this Court issue judgment declaring that the appointment of Mr. Walsh as independent counsel under the Act violates the Constitution of the United States.

3. That this Court issue judgment declaring that each and every appointment by Mr. Walsh of associate counsel violates the Constitution of the United States.

4. That this Court issue judgment declaring that each and every act of the independent counsel and his staff taken in the name of the United States, or otherwise in furtherance of the division of the court's Order of December 19, 1986, is unconstitutional.

5. That this Court issue judgment declaring that the provision of assistance to the independent counsel and his staff, by defendant Meese and the Department of Justice, in the form of resources and personnel of said Department, is unconstitutional.

6. That this Court enjoin and restrain defendant Walsh from exercising any and all of the authority and power conferred upon him by the division of the court pursuant to the Act.

7. That this Court enjoin and restrain defendant Walsh and anyone acting on his behalf, or on behalf of the Office of Independent Counsel, from purporting to exercise, exercising or seeking to exercise any power or authority of the United States or of the Department of Justice in furtherance of the independent counsel provisions of the Act.

8. That this Court enjoin and restrain defendant Meese, the Department of Justice, and any officer, em-

ployee or agent thereof from assisting the independent counsel or anyone acting on his behalf in any manner authorized by the Act.

9. That this Court grant such other and further relief as it deems just and appropriate.

Respectfully submitted,

WILLIAMS & CONNOLLY

By /s/ Brendan V. Sullivan, Jr.
BRENDAN V. SULLIVAN, JR.
Bar No. 12757
BARRY S. SIMON
TERRENCE O'DONNELL
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Washington, D.C. 20006
(202) 331-5000

Attorneys for Plaintiff
Oliver L. North

February 24, 1987

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. ——

OLIVER L. NORTH,
703 Kentland Drive,
Great Falls, Virginia,
Plaintiff,

v.

EDWIN MEESE III, Attorney General
of the United States

and

LAWRENCE E. WALSH, Independent Counsel,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT THAT ESTABLISHMENT OF THE "OFFICE OF INDEPENDENT COUNSEL: IRAN/CONTRA" VIOLATES THE CONSTITUTION AND 28 U.S.C. § 591 *et seq.*

I.

JURISDICTION

1. This is an action arising under the Constitution and laws of the United States against officers of the United States acting in their official capacity or under color of legal authority. The jurisdiction of this Court is invoked

under 28 U.S.C. § 1331 and 5 U.S.C. § 701 *et seq.* This Court is authorized to grant a declaratory judgment and such other relief as may be proper by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

II.

VENUE

2. This is a civil action against officers of the United States acting in their official capacity or under color of legal authority. The cause of action arises in the District of Columbia, as is hereinafter set out, within the meaning of 28 U.S.C. § 1391(e)(2), and venue properly lies in the District of Columbia.

III.

THE PARTIES

3. Plaintiff LtCol Oliver L. North resides at 703 Kentland Drive, Great Falls, Virginia.

4. Defendant Edwin Meese III is Attorney General of the United States. On March 5, 1987, Defendant Meese, acting in his capacity as Attorney General of the United States, issued a regulation establishing an Office of Independent Counsel: Iran/Contra, to be headed by an Independent Counsel. The final rule, codified at 28 C.F.R. Ch. 6, Part 600 *et seq.*, empowers the Independent Counsel to investigate allegations regarding, and prosecute charges against, plaintiff North and other unnamed government and private individuals, and to exercise all functions of the Attorney General of the United States and the United States Department of Justice for these purposes.

5. On March 5, 1987, defendant Meese appointed Lawrence E. Walsh to be the Independent Counsel heading the Office of Independent Counsel: Iran/Contra.

6. Defendant Lawrence E. Walsh is a private attorney purporting to act both as independent counsel, pursuant to the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*, and as Independent Counsel heading the Office of Independent Counsel: Iran/Contra, pursuant to 28 C.F.R. Ch. 6, Part 600, *et seq.*

IV.

ETHICS IN GOVERNMENT ACT

7. The Ethics in Government Act of 1978 ("the Act"), 28 U.S.C. § 591 *et seq.*, creates a mechanism for the judicial appointment of an independent counsel to investigate certain members and former members of the Executive Branch and certain officers of the President's national campaign committee.

8. Under the Act, the Chief Justice must designate and assign three judges or justices to a division of the United States Court of Appeals for the District of Columbia created for the purpose of appointing the independent counsel. 28 U.S.C. § 49.

9. Upon receipt of an application from the Attorney General, the division of the court shall appoint an appropriate independent counsel and shall define his prosecutorial jurisdiction. 28 U.S.C. § 593(b).

10. The division of the court may not appoint any person who holds or recently held any office of profit or trust under the United States. 28 U.S.C. § 593(d).

11. Upon appointment, the independent counsel purportedly enjoys, with respect to all matters in his prosecutorial jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except for those matters specifi-

cally requiring the Attorney General's personal action under 18 U.S.C. § 2516. 28 U.S.C. § 594(a).

12. The independent counsel shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under Section 5315 of Title 5. 28 U.S.C. § 594(b).

13. The independent counsel purportedly has the power to appoint, fix the compensation, and assign the duties of such employees as he deems necessary to carry out the duties of his office. 28 U.S.C. § 594(c).

14. An independent counsel appointed by the division of the court may not be removed from office, other than by impeachment and conviction, except by the personal action of the Attorney General; the Attorney General may remove the independent counsel only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the independent counsel's duties. 28 U.S.C. § 596(a)(1).

15. Whenever a matter is within the prosecutorial jurisdiction of an independent counsel or has been accepted by the independent counsel, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matters, except to the extent requested by the independent counsel to assist him, and except insofar as any investigation or prosecution is authorized in writing by the independent counsel. 28 U.S.C. § 597(a).

V.

APPLICATION OF THE ATTORNEY GENERAL

16. On or before December 4, 1986, acting pursuant to 28 U.S.C. § 592(c)(1), defendant Meese applied to the division of the court for the appointment of an in-

dependent counsel to investigate whether violations of federal criminal law were committed by plaintiff North, other United States Government officials, or other individuals acting in concert with plaintiff North or with other United States government officials, from in or around 1985 to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment.

VI.

ACTIONS OF THE DIVISION OF THE COURT

17. On December 4, 1986, Senior Circuit Judges MacKinnon, Morgan and Mansfield constituted the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit, sitting in the District of Columbia.

18. On December 19, 1986, the division of the court, sitting in the District of Columbia, issued an Order appointing defendant Walsh as independent counsel.

19. The division of the court purported to empower defendant Walsh to investigate, to the maximum extent authorized by 28 U.S.C. § 594, whether any person or group of persons described in 28 U.S.C. § 591, including LtCol Oliver L. North, other United States government officials, or other individuals or organizations acting in concert with LtCol North, or with other United States Government officials, has committed a violation of any federal criminal law (other than a petty offense), relating in any way to

(1) The direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) The direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or person acting, or purporting to act as an intermediary in any transaction above referred to in Section (1);

(3) The financing or funding of any direct or indirect sale, shipment, or transfer referred to in Section (1) or (2);

(4) The diversion of the proceeds from any transaction described in Section (1) or (2) to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) The provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

20. On December 19, 1986, the division of the court, sitting in the District of Columbia, further purported to empower defendant Walsh to investigate other allegations or evidence of violation of any federal criminal law by plaintiff North, and any person or entity previously referred to in its Order, developed during defendant Walsh's investigation, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

21. Plaintiff North is the only named subject of the criminal investigation commenced on December 19, 1986, and continuing through this date.

22. On December 19, 1986, the division of the court, sitting in the District of Columbia, further purported to empower defendant Walsh to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the federal criminal laws, in connection with the investigation authorized by the court's Order.

VII.

ACTIONS OF THE INDEPENDENT COUNSEL

23. Between December 19, 1986, and the present, defendant Walsh established the Office of Independent Counsel at the United States Courthouse, Room 4434, Washington, D.C. 20001, from which he is actively investigating plaintiff North and other individuals.

24. Between December 19, 1986, and the present, defendant Walsh purported to appoint at least nineteen attorneys to act as associate counsel and assist in the investigation of plaintiff North and other individuals; each of these nineteen attorney-appointees purports to be currently employed by the Office of Independent Counsel.

25. On January 28, 1987, Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia impaneled a federal grand jury in the District of Columbia as part of defendant Walsh's investigation of plaintiff North. The grand jury has the power to subpoena witnesses and documents as part of defendant Walsh's investigation and to return indictments charging violations of criminal laws.

26. Between January 28, 1987 and the present, defendant Walsh and one or more of his associate counsel, purporting to act in the name of the United States, have

caused to be issued and thereafter served subpoenas issued by the federal grand jury for the District of Columbia, in furtherance of the investigation of plaintiff North.

27. Between December 19, 1986 and the present, defendant Walsh and one or more of his associate counsel, purporting to act in the name of the United States, entered into cooperation agreements with or granted immunity to one or more witnesses, in order to obtain information for their investigation of plaintiff North.

28. On information and belief, between December 19, 1986 and the present, defendant Walsh has sought and received from the Department of Justice, with the acquiescence of defendant Meese, the assistance of numerous employees and agents of the Department of Justice, who currently are aiding the independent counsel in the conduct of his investigation of plaintiff North.

29. Beginning on December 19, 1986, and continuing through the present, defendant Walsh, defendant Meese, officers, agents and employees of the Office of Independent Counsel acting under and in combination with defendant Walsh, and officers, agents and employees of the Department of Justice assisting the Independent Counsel, have been conducting and continue to conduct an active investigation into the activities of plaintiff North and other individuals, as purportedly authorized by the December 19, 1986 Order of the division of the court.

VIII.

ACTIONS OF THE ATTORNEY GENERAL

30. On February 24, 1987, plaintiff North filed a complaint in Federal District Court seeking a declaratory judgment that the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*, are unconstitutional and requesting specified injunctive relief,

including an injunction precluding defendant Walsh from purporting to act as independent counsel.

31. On information and belief, between February 24, 1987, and March 5, 1987, defendant Walsh asked defendant Meese to appoint him as an Officer of the Department of Justice, in order to remove the cloud on the authority of the Office of Independent Counsel.

32. On March 5, 1987, defendant Meese promulgated new federal regulations establishing an Office of Independent Counsel: Iran/Contra, to be headed by an Independent Counsel. A copy of the final rule and the regulations, codified at 28 C.F.R. Ch. VI, part 600 *et seq.*, is attached hereto as Exhibit A and is incorporated herein by reference.

33. On March 5, 1987, defendant Meese appointed defendant Walsh as Independent Counsel heading the Office of the Independent Counsel: Iran/Contra. A copy of the Appointment Affidavit is attached hereto as Exhibit B and is incorporated herein by reference.

34. Defendant Meese established the Office of Independent Counsel: Iran/Contra "because of the pending lawsuit captioned *North* v. *Walsh and Meese*, D.D.C. No. 87-0457, which challenges the constitutionality of the appointment and activities of the Independent Counsel named pursuant to the Ethics in Government Act (28 U.S.C. 591 *et seq.*)," and "to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the *North* litigation."

35. Before defendant Meese issued the regulation, he already had "determined that this matter is appropriate for further investigation."

36. Passage of the rule was not meant to question the independence or authority of the Independent Counsel ap-

pointed under the Ethics in Government Act or to interfere in any way with his activities.

37. In promulgating the regulations, defendant Meese purports to act under 28 U.S.C. §§ 509, 510, and 515, and 5 U.S.C. § 301 and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the Constitution.

38. 28 C.F.R. § 600.1(a) purports to delegate to the Independent Counsel, with respect to all matters in his prosecutorial jurisdiction, full power and authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under 18 U.S.C. § 2516.

39. The specifically enumerated investigative and prosecutorial functions purportedly delegated to the Independent Counsel by the Attorney General are the same as the specifically enumerated investigative and prosecutorial functions purportedly delegated to the court-appointed independent counsel under the Ethics in Government Act, 28 U.S.C. § 594.

40. The purported jurisdiction of the Independent Counsel appointed by the Attorney General is the same as the purported jurisdiction of the court-appointed independent counsel.

41. The compensation provision of the Justice Department Regulation is the same as the compensation provision of the Act, 28 U.S.C. § 594(b) (set out at ¶ 12, above), except that no payment of compensation is authorized by the Attorney General in addition to that paid under 28 U.S.C. § 594(b).

42. The Justice Department regulation purports to give the Independent Counsel power to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary.

43. The Independent Counsel appointed by the Attorney General may ask the Attorney General to refer matters related to the Independent Counsel's prosecutorial jurisdiction. An Independent Counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within the Independent Counsel's prosecutorial jurisdiction. If such a referral is accepted, an Independent Counsel shall notify the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time.

44. The Independent Counsel appointed by the Attorney General shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. The Attorney General purports to give the Independent Counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

45. The Independent Counsel appointed by the Attorney General may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties.

46. Whenever a matter is in the prosecutorial jurisdiction of an Independent Counsel appointed by the Attorney

General or has been accepted by such Independent Counsel under 28 C.F.R. § 600.1(e), the Department of Justice, the Attorney General and all other officers and employees of the Department of Justice will suspend all investigations and proceedings regarding such matter, except to the extent required by 28 C.F.R. § 600.1(d), and except insofar as such Independent Counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

47. Nothing in the regulation promulgated by the Attorney General is intended to modify or impair any of the provisions of the Ethics in Government Act relating to the Independent Counsel, 28 U.S.C. § 591 *et seq.*, or of any order issued thereunder.

IX.

THE CLAIM

48. In his capacity as Independent Counsel heading the Office of Independent Counsel: Iran/Contra, defendant Walsh is purporting to act as an Officer of the United States, within the meaning of Article II, § 2 of the United States Constitution.

49. The regulation promulgated by the Attorney General, and the appointment of Mr. Walsh thereunder, violate the Constitution because an Officer exercising the powers entrusted to defendant Walsh by the Attorney General must be appointed by the President with the Advice and Consent of the Senate, and defendant Walsh was not so appointed.

50. The regulation promulgated by the Attorney General, and the appointment of Mr. Walsh thereunder, violate the Constitution because an Officer exercising the powers entrusted to defendant Walsh by the Attorney General must be removable at will by the President.

51. The regulation promulgated by the Attorney General, and the appointment of Mr. Walsh thereunder, violate the Constitution because they represent an unconstitutional delegation of all of the authority of the Attorney General.

52. The regulation promulgated by the Attorney General, and the appointment of Mr. Walsh thereunder, violate the independent counsel provisions of the Ethics in Government Act because under the Act the Department of Justice has no authority to entertain or participate in any investigations or proceedings within the prosecutorial jurisdiction of the court-appointed independent counsel.

53. The regulation promulgated by the Attorney General, and the appointment of defendant Walsh thereunder, are invalid, because defendant Meese lacks authority to limit the President's removal power, as he purports to do in this regulation.

54. The regulation promulgated by the Attorney General, and the appointment of defendant Walsh thereunder, are invalid, because defendant Meese lacks authority to delegate all of the powers purportedly conferred on defendant Walsh.

55. Creation of the Office of Independent Counsel: Iran/Contra, the appointment of Mr. Walsh to that office, and parallel activities of the Independent Counsel and his staff pursuant to the Ethics in Government Act and the Attorney General's regulation result in violations of conflict of interest rules and are unlawful.

56. The purported delegation to Mr. Walsh of the authority to seek immunity for witnesses violates 18 U.S.C. § 6003.

57. The regulation promulgated by the Attorney General, defendant Meese's delegations thereunder, and defendant Walsh's appointment and activities thereunder, violate the Constitution.

58. The regulation promulgated by the Attorney General, defendant Meese's delegations thereunder, and defendant Walsh's appointment and activities thereunder, violate the independent counsel provisions of the Ethics in Government Act.

59. The regulation promulgated by the Attorney General, defendant Meese's delegations thereunder, and defendant Walsh's appointment and activities thereunder, exceed the Attorney General's authority and are invalid, null, and void.

60. All actions of any person pursuant to the regulation promulgated by the Attorney General, taken in the name of the United States, are unconstitutional, invalid, null, and void.

61. Plaintiff is directly and concretely subject to and injured by the regulation promulgated by defendant Meese.

WHEREFORE, plaintiff requests

1. That this Court issue judgment that the Attorney General's regulation establishing the Office of Independent Counsel: Iran/Contra violates the Constitution and laws of the United States.

2. That this Court issue judgment declaring that the appointment of Mr. Walsh as Independent Counsel under the Attorney General's regulation violates the Constitution and laws of the United States.

3. That this Court issue judgment declaring that defendant Walsh has no authority to exercise any power pursuant to the Attorney General's regulation, and that the purported exercise of any such authority is unlawful, null and void.

4. That this Court issue judgment declaring that the provision of assistance to the Independent Counsel and any staff he might purport to appoint, by defendant Meese and the Department of Justice, pursuant to the

Attorney General's regulation, violates the Constitution and laws of the United States.

5. That this Court enjoin and restrain defendant Walsh from exercising any and all of the authority conferred upon him by the Attorney General's regulation.

6. That this Court enjoin and restrain defendant Walsh and anyone acting on his behalf, from purporting to exercise, exercising, or seeking to exercise any power or authority of the United States or of the Department of Justice in furtherance of the Attorney General's regulation.

7. That this Court enjoin and restrain defendant Meese, the Department of Justice, and any officer, employee or agent thereof from assisting the Independent Counsel or anyone acting on his behalf pursuant to the regulation.

8. That this Court grant such other and further relief as it deems just and appropriate.

Respectfully submitted,

WILLIAMS & CONNOLLY

By /s/ Brendan V. Sullivan, Jr.
BRENDAN V. SULLIVAN, JR.
Bar No. 12757
TERRENCE O'DONNELL
Bar No. 026849
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839 17th Street, N.W.
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Attorneys for Plaintiff
Oliver L. North

March 6, 1987

EXHIBIT 1

UNITED STATES DEPARTMENT OF JUSTICE

28 CFR Chapter VI—Offices of Independent Counsel

Part 600—General Powers of Independent Counsel

Part 601—Jurisdiction of the Independent Counsel: Iran/Contra

AGENCY: United States Department of Justice

ACTION: Final Rule.

SUMMARY: This rule establishes an Office of Independent Counsel: Iran/Contra, to be headed by an Independent Counsel. This Office is to be established pursuant to the Attorney General's statutory authority, found in 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution. This authority is being exercised because of the pending lawsuit captioned *North* v. *Walsh and Meese*, D.D.C. No. 87-0457, which challenges the constitutionality of the appointment and activities of the Independent Counsel named pursuant to the Ethics in Government Act (28 U.S.C. 591 *et seq.*). The President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act. In addition, I note that I have already determined that this matter is appropriate for further investigation. In light of the President's views, I have found it advisable to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of

the eventual outcome of the *North* litigation. Thus, this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities. To the contrary, this rule is intended to make certain that necessary investigation and appropriate legal proceedings can proceed in a timely manner.

EFFECTIVE DATE: March 5, 1987

FOR FURTHER INFORMATION CONTACT:

Thomas Barba, Counselor to the Assistant Attorney General, Civil Division, Room 3607, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, N.W., Washington D.C. 20530. Telephone: (202) 633-5713. This is not a toll-free number.

LIST OF SUBJECTS IN 28 CFR CHAPTER VI, PARTS 600, 601:

Crime, Conflict of interests, Foreign Relations, Government employees, Arms and munitions, Military personnel, National Defense, Authority delegations (Government agencies).

By the authority vested in me by 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution, title 28 Code of Federal Regulations, is amended as follows:

1. A new Chapter VI, entitled "Offices of Independent Counsel," is added immediately after Chapter V.

2. A new Part 600 is added as the first Part of Chapter VI, to read as follows:

Part 600—General Powers of Independent Counsel

Sec. 600.1 Authority and duties of an Independent Counsel

Sec. 600.2 Reporting and congressional oversight

Sec. 600.3 Removal of an Independent Counsel; termination of office

Sec. 600.4 Relationship with components of the Department of Justice

Sec. 600.5 Savings provision; severability

Authority: 28 U.S.C. 509, 510, and 515; 5 U.S.C. 301; Article II of the United States Constitution

Part 600—General Powers of Independent Counsel

Sec. 600.1 Authority and duties of an Independent Counsel

(a) An Office of Independent Counsel shall be under the direction of an Independent Counsel appointed by the Attorney General. An Independent Counsel shall have, with respect to all matters in his prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 of the United States Code. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal

matters, that such Independent Counsel deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such Independent Counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18 of the United States Code, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) An Independent Counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (b) of section 594 of title 28 of the United States Code.

(c) For the purposes of carrying out the duties of the Office of Independent Counsel, an Independent Counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (c) of section 594 of title 28 of the United States Code.

(d) An Independent Counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within the Independent Counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform the Independent Counsel's duties.

(e) An Independent Counsel may ask the Attorney General to refer matters related to the Independent Counsel's prosecutorial jurisdiction. An Independent Counsel may

accept referral of a matter by the Attorney General, if the matter relates to a matter within the Independent Counsel's prosecutorial jurisdiction as established by this chapter. If such a referral is accepted, an Independent Counsel shall notify the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time.

(f) An Independent Counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) An Independent Counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

Sec. 600.2 Reporting and congressional oversight

(a) An Independent Counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of the Independent Counsel. These statements and reports shall contain such information as the Independent Counsel deems appropriate.

(b) (1) In addition to any reports made under subsection (a) of this section, and before the termination of the Independent Counsel's office under this chapter, such Independent Counsel shall submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time, a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of the Independent Counsel which was not prosecuted.

(3) Unless prohibited by applicable law, an Independent Counsel may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as he deems appropriate.

(c) An Independent Counsel shall advise the House of Representatives of any substantial and credible information which such Independent Counsel receives that may constitute grounds for an impeachment. Nothing in this chapter shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) Nothing in this chapter shall prevent the appropriate committees of the Congress from exercising oversight jurisdiction with respect to the official conduct of any Independent Counsel appointed under this chapter, and such Independent Counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

Sec. 600.3 Removal of an Independent Counsel; termination of office

(a) (1) An Independent Counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties.

(2) If an Independent Counsel is removed from office, the Attorney General shall promptly submit to the division of the United States Court of Appeals for the District

of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report specifying the facts found and the ultimate grounds for such removal. The Attorney General will not object to the making available of the report to the public by the Committees or the division of the Court.

(3) To the extent otherwise permitted by law, an Independent Counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time, or any court of competent jurisdiction and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief; provided that an Independent Counsel originally appointed by court order shall have such rights of review as provided by said order and by section 596(a)(3) of title 28 of the United States Code.

(b) An office of Independent Counsel shall terminate when (A) the Independent Counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of the Independent Counsel or accepted by such Independent Counsel under section 600.1 (e) of this chapter, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the Independent Counsel files a report in full compliance with section 600.2(b) of this chapter.

Sec. 600.4 Relationship with components of the Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of an Independent Counsel or has been accepted by an Independent Counsel under section 600.1(e) of this

chapter, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 600.1(d) of this chapter, and except insofar as such Independent Counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an Independent Counsel participates in an official capacity or any appeal of such a case or proceeding.

Sec. 600.5 Savings provision; severability

(a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of title 28 of the United States Code), or of any order issued thereunder.

(b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision.

3. A new Part 601 is added immediately after Part 600, to read as follows:

Part 601—Jurisdiction of the Independent Counsel: Iran/Contra

Sec. 601 Jurisdiction of the Independent Counsel: Iran/Contra

(a) The Independent Counsel: Iran/Contra has jurisdiction to investigate to the maximum extent authorized

by Part 600 of this chapter whether any person or group of persons currently described in section 591 of title 28 of the United States Code, including Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals or organizations acting in concert with Lt. Col. North, or with other United States Government officials, has committed a violation of any federal criminal law, as referred to in section 591 of title 28 of the United States Code, relating in any way to

(1) the direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, or persons, organizations or entities connected with or purporting to represent that government, or persons located ~~in Iran~~;

(2) the direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or person acting, or purporting to act as an intermediary in any transaction above referred to in section (1);

(3) the financing or funding of any direct or indirect sale, shipment or transfer referred to in section (1) or (2);

(4) the diversion of the proceeds from any transaction described in section (1) or (2) to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) the provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

(b) The Independent Counsel: Iran/Contra shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Oliver L. North, and any person or entity heretofore re-

ferred to, developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

(c) The Independent Counsel: Iran/Contra shall have prosecutorial jurisdiction to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of section 1826 of title 28 of the United States Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the federal criminal laws, in connection with the investigation authorized by part 600 of this chapter.

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

Date: March 5, 1987

Billing Code: 4410-01

EXHIBIT 2

APPOINTMENT AFFIDAVITS

Independent Counsel
(Position to which appointed)

March 5, 1987
(Date of appointment)

Office of the Independent Counsel:
(Department or agency)

Iran/Contra
(Bureau or division)

Washington, D.C.
(Place of employment)

I, Lawrence E. Walsh, do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the offices on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. - AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

/s/ Lawrence E. Walsh
(Signature of appointee)

Subscribed and sworn (or affirmed) before me this 5th day of March A.D. 1987, at Washington, D.C..

(City) *(State)*

[SEAL] /s/ Signature Illegible
(Signature of officer)

Notary Public
(Title)

Commission expires August 14, 1990.
(If by a Notary Public, the date of expiration of his Commission should be shown)

NOTE.—*The oath of office must be administered by a person specified in 5 U.S.C. 2903. The words "So help me God" in the oath and the word "swear" wherever it appears above should be stricken out when the appointee elects to affirm rather than swear to the affidavits; only these words may be stricken and only when the appointee elects to affirm the affidavits.*

* U.S. GPO: 1979-0-261-157/4236

APPENDIX F

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 87-5056

MICHAEL K. DEAVER,
Appellant,

v.

WHITNEY NORTH SEYMOUR, JR.,
as Independent Counsel, et al.

June 15, 1987

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-00477)

Whitney North Seymour, Jr. and George F. Hritz, New York City, were on the opposition.

Herbert J. Miller, Jr., Randall J. Turk and Stephen L. Braga, Washington, D.C., were on the motion.

ON APPELLANT'S EMERGENCY
MOTION FOR A STAY

Before SILBERMAN, WILLIAMS and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Separate Concurring Statement filed by Circuit Judge D.H. GINSBURG.

SILBERMAN, Circuit Judge:

This case involves a challenge by former White House Deputy Chief of Staff Michael K. Deaver to the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-98 (1982 & Supp. III 1985). Deaver filed a civil complaint in federal district court seeking declaratory and injunctive relief from independent counsel Whitney North Seymour, Jr.'s continued exercise of prosecutorial authority. Following the district court's denial of his motion for a preliminary injunction, Deaver appealed to this court and moved for an Emergency Stay to preserve the status quo until we determined the constitutionality *vel non* of the Act. He alleged that absent a stay he would suffer imminent, irreparable harm in the form of a criminal indictment obtained by Seymour. In an Order dated March 17, 1987, we held that Deaver's lawsuit constituted an impermissible preemptive civil challenge to a criminal proceeding. Accordingly, we denied the motion for Emergency Stay, and on our own motion, summarily affirmed the district court's denial of a preliminary injunction. We then ordered the case remanded to the district court with directions to dismiss the complaint. We now explain that decision.

I.

From 1981 until 1985, Michael Deaver served as White House Deputy Chief of Staff and Assistant to the President of the United States. In May of 1985, Deaver left his position at the White House and established the firm of Michael K. Deaver and Associates, a lobbying association of which he is the president. Thereafter, Deaver's

contacts with government officials on behalf of his clients became the object of public scrutiny. On April 23, 1986, five members of the United States Senate wrote to the Attorney General and, pursuant to 28 U.S.C. § 595(e) (1982),[1] requested the appointment of an independent counsel to investigate Deaver's lobbying activities. Amid growing public speculation concerning the possible impropriety of his contacts with former White House associates on behalf of his clients, Deaver himself requested that an independent counsel be appointed. Finding reasonable grounds to warrant further investigation or prosecution, the Deputy Attorney General on May 22, 1986 applied to a special division of this court for appointment of an independent counsel.[2] The application detailed al-

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[1] Section 595(e) provides:

> A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a[n] independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

[2] The Act provides for the assignment of three Circuit Judges to a division of the United States Court of Appeals for the District of Columbia Circuit for the purpose of appointing independent counsels. *See* 28 U.S.C. § 49 (1982). If the Attorney General, upon completion of a preliminary investigation, finds "reasonable

leged attempts by Deaver to lobby the White House on behalf of two clients, the Government of Canada and the Commonwealth of Puerto Rico, and requested an investigation to determine whether prosecution was warranted for violations of 18 U.S.C. § 207 (1982)[3] or any other federal criminal law.

One week later, the court appointed Whitney North Seymour, Jr. to serve as independent counsel. After organizing a staff and arranging for a grand jury, Seymour began a nine-month investigation into Deaver's lobbying activities. On February 24, 1987, Seymour informed Deaver that he was about to ask the grand jury to return an indictment. The next day, Deaver filed this civil action claiming the Ethics in Government Act is unconstitutional because it vests prosecutorial authority, which belongs exclusively to the Executive branch, in an individual who is not subject to presidential appointment, control, or removal. Deaver moved to enjoin preliminarily Seymour's efforts to obtain an indictment, contending that immediate and irreparable harm would befall him if equitable relief were not granted. He asserted that if Seymour's activities were not halted, he would suffer the "continuing destruction of his business," "injury to his reputation and dignity," and "the expenditure of substantial resources in his defense."

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grounds" to believe that further investigation or prosecution is warranted, or, if within ninety days after receiving "information" sufficient to preliminarily investigate a person, fails to find that no investigation or prosecution is warranted, then the Attorney General "shall apply to the division of the court for appointment of a[n] independent counsel." 28 U.S.C. § 592(c)(1) (1982). The Attorney General recused himself from this matter and appointed the Deputy Attorney General to act in his place.

[3] Section 207 prohibits former high-level federal employees from lobbying the government under certain circumstances in connection with matters for which they had responsibility as government officials.

The district court temporarily restrained Seymour from seeking an indictment. Later, however, applying the four-part test set out by this court in *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977), the court denied the motion for a preliminary injunction. The district court concluded that any harm Deaver might suffer as the result of a criminal indictment was not irreparable because there existed an adequate remedy at law, since Deaver could move to dismiss the charges under Federal Rule of Criminal Procedure 12(b)(1) for "defects in the institution of the prosecution." The court also concluded that Deaver had failed to demonstrate the likelihood of ultimate success on the merits because, in the district court's view, the Act would probably not be found to offend the Constitution. Finally, the court concluded the public interest required that any possible violations of the criminal law be speedily prosecuted, an interest most likely secured by allowing Seymour immediately to seek an indictment.

Although the denial of Deaver's application for a preliminary injunction is an interlocutory order appealable under 28 U.S.C. § 1292(a)(1) (1982),[4] the district court in addition certified for this court's review the question of the constitutionality *vel non* of the Act as a "controlling question of law" pursuant to 28 U.S.C. § 1292(b) (1982).[5] Deaver immediately appealed the district

[4] Section 1292(a)(1) provides "[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ." 28 U.S.C. § 1292(a)(1) (1982).

[5] Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law

court's order and sought emergency injunctive relief to preclude an indictment pending our review. We entered a five-day administrative stay and ordered the parties to file supplemental briefs.

On March 17, 1987, after considering the supplemental briefs, we dissolved our administrative stay, denied Deaver's Emergency Motion for Stay, affirmed the district court's denial of his motion for a preliminary injunction, and remanded the case with directions to dismiss the complaint.

II.

The district court, applying the *Holiday Tours* test, thought it necessary to consider the likelihood that appellant would succeed on the merits of his constitutional challenge to the authority of the independent counsel. We do not. Even were we disposed to agree entirely with appellant's constitutional argument, we think he has no right to an injunction restraining a pending indictment in a federal court.

The traditional rule, dating back to the English division between courts of law and equity, was that the latter had "no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors" and therefore could not enjoin criminal proceedings, *In re Sawyer*, 124 U.S. 200, 210, 8 S.Ct. 482, 487, 31 L.Ed. 402 (1888). Departing somewhat from this rule around the turn of the century, the Supreme Court in certain cases permitted federal courts to issue injunctions against *state* court criminal proceedings that threatened federal con-

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as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

28 U.S.C. § 1292(b) (1982).

stitutional rights. *See, e.g., Dobbins v. Los Angeles*, 195 U.S. 223, 241, 25 S.Ct. 18, 22, 49 L.Ed. 169 (1904) (court of equity may enjoin prosecution under void law where property rights would otherwise be destroyed); *Truax v. Raich*, 239 U.S. 33, 38, 36 S.Ct. 7, 9, 60 L.Ed. 131 (1915) (court may enjoin enforcement of unconstitutional criminal law when essential to protect right to earn a livelihood). A federal injunction was available to prevent state officers from instituting criminal proceedings "under extraordinary circumstances where the danger of irreparable loss [of a constitutional right was] both great and immediate." *See Fenner v. Boykin*, 271 U.S. 240, 243, 46 S.Ct. 492, 493, 70 L.Ed. 927 (1926).

More recently however, the Court, troubled by notions of comity, tightened the criteria for granting federal injunctions that interfere with state criminal proceedings, holding that the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" are not recognized as irreparable injuries justifying an equitable remedy. *Younger v. Harris*, 401 U.S. 37, 46, 91 S.Ct. 746, 751-52, 27 L.Ed.2d 669 (1971). *See also Bokulich v. Jury Commission of Greene County*, 394 U.S. 97, 98, 89 S.Ct. 767, 768, 22 L.Ed.2d 109 (1969); *Spielman Motor Sales Co., Inc v. Dodge*, 295 U.S. 89, 96, 55 S.Ct. 678, 681, 79 L.Ed. 1322 (1935). Although it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved. *See Douglas v. City of Jeannette*, 319 U.S. 157, 163, 63 S.Ct. 877, 880-81, 87 L.Ed. 1324 (1943); *Beal v. Missouri Pacific R.R. Corp.*, 312 U.S. 45, 49, 61 S.Ct. 418, 420-21, 85 L.Ed. 577 (1941). As Justice Frankfurter explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citi-

zenship." *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940).

Thus, in the past few decades, the Supreme Court has upheld federal injunctions to restrain state criminal proceedings only where the threatened prosecution chilled exercise of First Amendment rights, *see, e.g., Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (threatened enforcement of unconstitutional statute requiring "Live Free or Die" motto on car license plate against those covering up motto); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (ordinance banning topless dancing, enforcement of which threatens to bankrupt petitioner); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (civil rights workers repeatedly prosecuted under state law broadly regulating speech).[6] *See also Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (granting declaratory relief to handbill distributors repeatedly threatened with arrest). In all other cases that have arisen in that period, a person asserting a constitutional challenge to criminal process has been thought to have an adequate non-injunctive remedy; he may raise his constitutional claim as a defense in the state criminal proceedings, once initiated.

We have recently recognized that while the *Younger* line of cases constricts federal intervention in *state* prosecutions, it does not necessarily control a petition for a federal civil injunction to restrain an ongoing *federal* criminal proceeding. *See Juluke v. Hodel*, 811 F.2d 1553, 1556-57 (D.C.Cir. 1987). Nevertheless, in no case that

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[6] In *Dombrowski*, the plaintiffs had alleged that their prosecutions were brought in bad faith, *see* 380 U.S. at 482, 85 S.Ct. at 1118-19, yet the Court did not seem to rely on this allegation as the primary basis for ordering that an injunction be granted. *But see Younger v. Harris*, 401 U.S. 37, 47-49, 91 S.Ct. 746, 752-753, 27 L.Ed.2d 669 (1971) (discussing *Dombrowski*).

we have been able to discover has a federal court enjoined a federal prosecutor's investigation or presentment of an indictment. Of course, a federal prosecutor typically brings cases only in federal court,[7] thereby affording defendants, after indictment, a federal forum in which to assert their defenses—including those based on the Constitution. Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors.[8] Moreover, as the district court noted, Rule 12(b)(1) of the Federal Rules of Criminal Procedure permits any defendant to raise by motion, after indictment but before trial, a defense based on "defects in the institution of the prosecution."[9] Deaver's challenge is essentially that—a contention that there would be a constitutional defect in the institution of any prosecution growing out of the independent counsel's investigation. By implication, the existence of Rule 12(b)(1) suggests that appellant's constitu-

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[7] In the District of Columbia, the United States Attorney may also prosecute criminal charges in the District of Columbia court system. *See* D.C. Code Ann. § 23-101(c) (1981).

[8] *Juluke* assumed (but did not actually hold) that federal courts may extend *Doran* and *Wooley* to justify enjoining future *federal* arrests and prosecutions that chill the exercise of First Amendment rights. *See* 811 F.2d at 1557. Deaver is neither asserting a violation of First Amendment rights nor complaining that Seymour's threatened indictment chills future behavior.

[9] The Federal Rules of Criminal Procedure are a comprehensive set of rules of pleading, practice, and procedure for federal criminal prosecutions. The Supreme Court has been given authority by statute to prescribe such rules and present them to the Congress for examination. The proposed rules take effect 90 days later, unless Congress, by legislation, delays their implementation and/or amends them. Once put into effect, the Federal Rules have the force of law. *See* 18 U.S.C. § 3771 (1982). *See also* Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A.J. 1203 (1975).

tional challenge is not to be raised in a preindictment civil injunctive action. This implication is strengthened by the traditional reluctance, which we have discussed, of an equity court to interfere with criminal proceedings. And we think the limited appealability of district court orders denying pretrial motions in criminal cases makes the implication that Deaver cannot bring this Rule 12 (b)(1)-type claim to our court inescapable. A district court's denial of a pretrial motion is ordinarily not considered a "final decision" appealable under 28 U.S.C. § 1291; the defendant must therefore stand trial, and only after conviction may he bring the issue to the Court of Appeals. *See United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 264, 102 S.Ct. 3081, 3082, 73 L.Ed.2d 754 (1982); *United States v. Bird*, 709 F.2d 388, 390 (5th Cir. 1983). The Supreme Court has departed from this application of the "final judgment rule" in criminal cases on only three occasions; in each case it found the district court's decision effectively final under the collateral order doctrine. *See Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). The Court has permitted interlocutory appeal of the denial of motions to reduce excessive bail, *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), to dismiss an indictment on double jeopardy grounds, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), and to dismiss a prosecution against a congressman prohibited by the Speech and Debate Clause of the Constitution, *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979).[10] In each case, immediate appeal was necessary

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[10] Applying the rationale of *Helstoski*, three circuit courts have permitted sitting federal officials who claim immunity from prosecution on separation of powers grounds to bring interlocutory appeals from the denial of their motions to dismiss. *See United States v. Myers*, 635 F.2d 932 (2d Cir. 1980) (Member of Con-

because the petitioner had alleged the violation of a specific right guaranteed by the Constitution "the legal and practical value of which would be destroyed if it were not vindicated before trial." *Hollywood Motor Car*, 458 U.S. at 266, 102 S.Ct. at 3083 (quoting *United States v. MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552, 56 L.Ed.2d 18 (1978)).

Deaver argues that the independent counsel's investigation violates important rights and that this violation cannot adequtely be remedied at a later date. He contends that he is being forced to defend himself against criminal charges brought by a mere private citizen—a vigilante. It is true that the burden of being haled into court by a pretender to the throne, so to speak, cannot be completely remedied once a trial begins, for the defendant would still have suffered the indignity. Yet, without deciding an issue not squarely before us, we doubt that Deaver's claim—were it unsuccessfully raised in a Rule 12(b)(1) motion after indictment—would be immediately appealable under the collateral order exception to the final judgment rule. Unlike the defendants in the cases described above, Deaver does not assert a constitutional right not to stand trial, but merely claims that Seymour is not qualified to direct the prosecution. Assuming *arguendo* Deaver's contention is correct, his rights can be vindicated by a reversal of any conviction. *See, e.g., Hollywood Motor Car*, 458 U.S. at 268, 102 S.Ct. at 3084 (defendant's prosecutorial vindictiveness claim can be remedied through post-conviction appeal); *United States v. MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552-53, 56 L.Ed.2d 18 (1978) (objection to trial based on speedy trial grounds appealable only after conviction); *United States v. Taylor*, 798 F.2d 1337, 1340

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gress); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) (federal judge); *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984) (federal judge).

(10th Cir. 1986) (claims of prosecutorial misconduct, including improper use of state officers in grand jury investigation, appealable after conviction); *Bird*, 709 F.2d at 392 (claim that prosecution violated plea bargain agreement not to prosecute can be vindicated on post-conviction appeal). Thus, were Deaver to bring this same claim as a Rule 12(b)(1) motion, we think it likely the final judgment rule would bar any appeal of a denial of that motion until after conviction. Were we to allow Deaver to bring a civil challenge, with its attendant rights of appeal, before a prosecution even begins, we would thereby undermine the final judgment rule.

That Deaver's challenge is a serious one with far-ranging and troubling constitutional implications does not support his argument for accelerated and unorthodox judicial review. Indeed, it substantially weakens it. We have an obligation to avoid constitutional questions if at all possible. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48, 56 S.Ct. 466, 482-84, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). This principle is particularly strong when the constitutionality of a federal statute is challenged. *See Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1100 (D.C.Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3272, 91 L.Ed.2d 563 (1986). If appellant is acquitted of the charges brought against him, we of course would not be obliged to decide this constitutional issue.[11]

Congress has established a comprehensive set of rules governing federal criminal prosecutions—the Federal

[11] The district court's certification of the constitutional question as a controlling question of law under 28 U.S.C. § 1292(b) (1982) does not affect our disposition. To be sure, that issue may well be controlling in the criminal proceeding that would follow Deaver's indictment, but, of course, section 1292(b), by its terms, does not apply to criminal proceedings. And, as we have explained, the issue cannot be controlling in this suit since appellant may not raise the issue in the manner he did.

Rules of Criminal Procedure. These rules provide adequate, although limited, opportunities for defendants to challenge shortcomings in prosecutorial authority. The final judgment rule, moreover, generally prevents defendants from bringing appeals until after conviction. We cannot allow Deaver to avoid these rules—and thereby encourage a flood of disruptive civil litigation—by bringing his constitutional defense in an independent civil suit. Prospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure.

D.H. GINSBURG, Circuit Judge, concurring:

It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44, 91 S.Ct 746, 750, 27 L.Ed.2d 669 (1971), quoted approvingly in *Juluke v. Hodel*, 811 F.2d 1553, 1557 (D.C.Cir.1987).[1] The district

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[1] In *Juluke*, this court indicated that the federalism concerns underlying *Younger* in the context of a federal court asked to enjoin a state prosecution did not operate "in a situation involving civil and criminal proceedings in separate *federal* court actions." 811 F.2d at 1556 (emphasis in original). At the same time, however, we reaffirmed the broad equitable principle announced in *Younger* and quoted in the text. Accordingly, after quoting this passage from *Younger*, the court in *Juluke* stated:

> To the extent that [this equitable doctrine] suggests that the District Court judge in the civil case had discretion to defer action in the proceeding before him pending resolution of the criminal case, the principle is unexceptional . . . .
>
> The only conceivable reason not to consider the claim for injunctive relief in the civil case was that it would have been inefficient to do so, because the same issues—the validity and applicability of the regulations—would be decided in the criminal action. That, however, merely restates the traditional

court applied this rule in denying Michael Deaver's request for a preliminary injunction preventing independent counsel Whitney North Seymour, Jr. from seeking an indictment from the grand jury. On appeal we must decide whether the district court abused its discretion in so holding. *See Doran v. Salem Inn, Inc.*, 422 U.S. 931-32, 95 S.Ct. 2561, 2567-68, 45 L.Ed.2d 648 (1975); *Juluke v. Hodel*, 811 F.2d at 1558.

As the court has explained, *see* at 66, 67-68, Deaver challenges the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-98 (1982 & Supp. III 1985), and he claims that, if indicted, he would suffer the "continuing destruction of his business," "injury to his reputation and dignity," and "the expenditure of substantial resources in his defense." It is clear that this type of harm does not rise to the level of "irreparable injury":

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

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test for denying the consideration of equitable relief—that there is an adequate remedy available at law. We find this reason persuasive as to whether one court may enjoin an ongoing prosecution in another court.

Id. at 1557. The court then proceeded to determine whether the district court had abused its discretion in denying injunctive relief as against arrests for future conduct ("They never sought to enjoin the existing prosecutions." *Id.*), and relied upon the *Younger* line of cases for guidance as to when it is appropriate to grant equitable relief. I apply the *Younger* cases in order to determine whether injunctive relief against a single prosecution is appropriate, applying the same equitable principles as did the court in *Juluke*.

Younger v. Harris, 401 U.S. at 46, 91 S.Ct. at 751-52 (citation omitted). It is of no moment that Deaver bases his challenge upon the alleged unconstitutionality of the office of independent counsel; injunctive relief is not granted

> even if [the complained-of] statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid."

Watson v. Buck, 313 U.S. 387, 400, 61 S.Ct. 962, 966, 85 L.Ed. 1416 (1941), quoting *Beal v. Missouri Pacific Railroad Corp.*, 312 U.S. 45, 49, 61 S.Ct. 418, 420-21, 85 L.Ed. 577 (1941). *See Younger v. Harris*, 401 U.S. at 49, 91 S.Ct. at 753. The district court therefore did not abuse its discretion in denying injunctive relief here, because "the injury that [Deaver] faces is solely 'that incidental to every criminal proceeding brought lawfully and in good faith.'" [2] *Younger v. Harris*, 401 U.S. at

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[2] Deaver claims that indictment will result in the "continuing destruction of his business," but this harm does not compare to that relied upon in *Doran v. Salem Inn*. In that case, the Court, on a "close" call, upheld the grant of injunctive relief to bars which were threatened with prosecution for employing topless dancers. It was undisputed that "absent preliminary relief, they would suffer a substantial loss of business and perhaps even bankruptcy" if forced to comply with the law. 422 U.S. at 932, 95 S.Ct. at 2568. Here, unlike in *Doran*, business interests would suffer only indirectly from indictment, as a result of the harm to Deaver's reputation. Such harm is not only more conjectural than that in *Doran*, but is also intimately linked with the "discomfiture" of prosecution that must be borne "even by an innocent person." *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940).

49, 91 S.Ct. at 753, quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 164, 63 S.Ct. 877, 881, 87 L.E. 1324 (1943).[3] Because I read the court's decision to rest ultimately upon the same basis, *see* at 69, I concur.

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[3] Deaver contends that, due to the alleged constitutional infirmities in the office of independent counsel, any indictment here would not be "brought lawfully." A further reading of *Douglas* indicates that this phrase was meant to distinguish the situation in *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), in which a union sought injunctive relief barring the New Jersey police from continuing their practice of repeatedly removing from Jersey City union members engaged in leafletting and "compell[ing] them to board ferry boats destined for New York." *Id.* at 501, 59 S.Ct. at 958. In light of these facts, the Court stated that the "exclusion, removal, personal restraint and interference, by force and violence, are accomplished without authority of law and without promptly bringing the persons taken into custody before a judicial officer for hearing." *Id.* at 505, 59 S.Ct. at 959. It was in this sense that the criminal proceedings in *Hague* were not "brought lawfully."

In Deaver's case, conversely, he has available to him the legal remedies provided in the criminal process—certainly post-indictment, as the court indicates, and perhaps even pre-indictment if the narrow circumstances contemplated in *United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1581-82, 29 L.Ed.2d 85 (1971) arise ("If . . . [a] subpoena is unduly burdensome or otherwise unlawful, [the petitioner] may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him."). In these circumstances, where the petitioner has not shown irreparable harm, a court of equity may not grant civil injunctive relief and thereby supplant the criminal process. *See Juluke v. Hodel*, 811 F.2d at 1557-58, and cases cited in n. 20.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH,

Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, and EDWIN MEESE III, ATTORNEY GENERAL,

Respondents.

OLIVER L. NORTH,

Petitioner,

v.

EDWIN MEESE III, ATTORNEY GENERAL, and LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

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QUESTIONS PRESENTED

1. Whether a federal court may, consistent with long-established principles of equity and ripeness, entertain a pre-indictment civil action seeking injunctive and declaratory relief against the investigative activities of a federal prosecutor and grand jury?

2. Whether this Court should address the procedural problems presented by such a civil action where the underlying substantive issue has since been resolved in another proceeding?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1094

OLIVER L. NORTH,

Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, and EDWIN MEESE III, ATTORNEY GENERAL,

Respondents.

OLIVER L. NORTH,

Petitioner,

v.

EDWIN MEESE III, ATTORNEY GENERAL, and LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

Lawrence E. Walsh, Independent Counsel, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit which rejected petitioner's attempt to halt an on-

going grand jury investigation by bringing collateral civil actions (Pet. App. A).[1] As described below, the decision of the court of appeals follows long-standing precedents in which the courts have declined to exercise their equitable powers to interrupt criminal investigations in advance of indictments.

STATEMENT OF THE CASE

A. The Appointment of Independent Counsel

On November 25, 1986, President Reagan announced that the preceding Friday, after becoming concerned as to whether the national security apparatus had provided him with a complete factual record respecting the implementation of his policy toward Iran, he had directed Attorney General Edwin Meese III to conduct a review of the matter over the weekend. 22 Weekly Comp. Pres. Doc. 1604 (1986). The President further stated that he had concluded that certain activities undertaken in this connection raised "serious questions of propriety." *Id.*

On December 2, 1986, one week after the initial announcement of the Justice Department's investigation, Attorney General Meese announced that he had concluded that he should apply for the appointment of an Independent Counsel. On December 4, 1986, the Attorney General filed an application for appointment of an Independent Counsel with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division"). In his application to the Special Division, the Attorney General expressly stated that an Independent Counsel should be appointed pursuant to 28 U.S.C. § 591(c), which provides for the appointment of an Independent Counsel "if the Attorney General determines that investigation . . . by the Attorney General or other

[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.", respectively.

officer of the Department of Justice may result in a personal, financial, or political conflict of interest."

On December 19, 1986, the Special Division filed an order appointing Lawrence E. Walsh as Independent Counsel in the Iran/Contra matter. Order Appointing Independent Counsel, *In re Oliver L. North, et al.*, Div. No. 86-6, Dec. 19, 1986. As requested by the Attorney General, the Special Division authorized the Independent Counsel to investigate possible violations of federal criminal law by petitioner North, other United States Government officials, and individuals acting in concert with them. On December 19, 1986, Mr. Walsh accepted his appointment and began his investigation.

B. The Attorney General's Parallel Appointment of Independent Counsel

On March 5, 1987, after petitioner had brought the first of the two civil actions that are the subjects of this petition (as described below), Attorney General Meese issued a regulation, 28 C.F.R. Parts 600 and 601, which created an "Office of Independent Counsel: Iran/Contra" and provided that office with the same jurisdiction and powers that it already possessed under the Ethics in Government Act and the December 19, 1986 court order appointing Independent Counsel. 52 Fed. Reg. 7270 (March 10, 1987), 9241 (March 23, 1987).

The Attorney General stated that his purpose in issuing the regulation was "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. at 7271. He emphasized that the regulation was "not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." 52 Fed. Reg. at 7270-71. As the Department of Justice stated in its brief in this case in the district court, under the Attorney General's regulation Independent Counsel possesses the full authority

conferred by his court appointment. *See* Attorney General's Reply Memorandum in Support of Attorney General's Motion to Dismiss at 8, *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987), *aff'd*, No. 87-5058 (D.C. Cir. Oct. 1, 1987). The Attorney General's regulation confirmed in the same terms as the Independent Counsel statute and the court order the nature and scope of Independent Counsel's authority, his independence, the limitations on his removal, and the scope of his investigation.[2]

C. North's Two Civil Actions Seeking to Enjoin Independent Counsel's Investigation

On February 24, 1987, less than one month after the grand jury was empaneled in this matter, petitioner brought his first action for declaratory and injunctive relief. *North v. Walsh*, D.D.C., Civil Action No. 87-0457 ("*North I*"). He asserted that the Independent Counsel provisions of the Ethics in Government Act were unconstitutional, and sought nothing less than to halt the entire investigation of the Iran/Contra matter by Independent Counsel. Petitioner demanded the following relief:

> "1. That this Court issue judgment declaring that the independent counsel provisions of the Act violate the Constitution of the United States.
>
> 2. That this Court issue judgment declaring that the appointment of Mr. Walsh as independent counsel under the Act violates the Constitution of the United States.
>
> 3. That this Court issue judgment declaring that each and every appointment by Mr. Walsh of

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[2] *Compare* 28 C.F.R. § 600.1 (Authority and duties of an Independent Counsel) *with* 28 U.S.C. § 594 (same), *and compare* 28 C.F.R. § 601.1 (Jurisdiction of the Independent Counsel: Iran/Contra) *with* December 19, 1986 Order, pp. 1-3 (same).

associate counsel violates the Constitution of the United States.

4. That this Court issue judgment declaring that each and every act of the independent counsel and his staff taken in the name of the United States, or otherwise in furtherance of the division of the court's Order of December 19, 1986, is unconstitutional.

5. That this Court issue judgment declaring that the provision of assistance to the independent counsel and his staff, by defendant Meese and the Department of Justice, in the form of resources and personnel of said Department, is unconstitutional.

6. That this Court enjoin and restrain defendant Walsh from exercising any and all of the authority and power conferred upon him by the division of the court pursuant to the Act.

7. That this Court enjoin and restrain defendant Walsh and anyone acting on his behalf, or on behalf of the Office of Independent Counsel, from purporting to exercise, exercising or seeking to exercise any power or authority of the United States or of the Department of Justice in furtherance of the independent counsel provisions of the Act.

8. That this Court enjoin and restrain defendant Meese, the Department of Justice, and any officer, employee or agent thereof from assisting the independent counsel or anyone acting on his behalf in any manner authorized by the Act.

9. That this Court grant such other and further relief as it deems just and appropriate."

North I, Complaint and Request for Injunction (Pet. App. 40a-41a).

Eleven days after filing his first civil action, on the day following the Attorney General's parallel appoint-

ment of Independent Counsel, petitioner filed a second complaint. *North v. Meese*, D.D.C., Civil Action No. 87-0626 (*"North II"*). He now contended that the Attorney General's appointment of Mr. Walsh as Independent Counsel under the regulation violated the Constitution and laws of the United States, and sought similarly broad relief. *See* Complaint and Request for Injunction, *North II* (Pet. App. 42a-56a). In *North I*, petitioner objected to the court appointment and statutory authorization of an Independent Counsel, but claimed that Executive appointment of an Independent Counsel would be appropriate. In *North II*, petitioner objected to the Executive appointment of an Independent Counsel.

On March 12, 1987, the district court dismissed both of petitioner's complaints, concluding that North's pre-indictment challenges were premature and that he, "like any other potential criminal defendant, can raise his objections by appropriate motions, *if* and *when* an indictment is entered." *North v. Walsh*, 656 F. Supp. 414, 423 (D.D.C. 1987), *aff'd*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) (emphasis in original) (Pet. App. 5a, 23a). On October 1, 1987, the court of appeals summarily affirmed that decision, holding unanimously that petitioner "has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action . . . [P]otential criminal defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *North v. Walsh*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) (*per curiam*) (quotation omitted) (Pet. App. 4a).

The petition for certiorari herein was filed on December 30, 1987, the last day permitted under this Court's rules. In the meantime, as described below, the underlying substantive issue which petitioner attempted to raise in these civil actions has since been resolved against him in another proceeding.

D. North's Subsequent Attack Upon the Authority of Independent Counsel

On April 7, 1987, petitioner North was served with a grand jury subpoena calling for certain unprivileged information. North refused to produce the requested information and was held in civil contempt. On July 10, 1987, Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia upheld the authority of Independent Counsel under the Attorney General's regulation, and found it unnecessary to reach the constitutionality of the Independent Counsel statute. *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987).

On August 20, 1987, a panel of the court of appeals affirmed the order of the district court in an opinion by Circuit Judge D. H. Ginsburg. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, No. 87-869 (U.S. Jan. 19, 1988). All three judges agreed that Independent Counsel and his subordinates have legal authority to pursue the investigation in the Iran/Contra matter under the Attorney General's regulation. Rehearing *en banc* was unanimously denied by the court of appeals on October 23, 1987. North filed a petition for a writ of certiorari, which was denied by this Court on January 19, 1988. *North v. Walsh*, No. 87-869.

REASONS FOR DENYING THE WRIT

The actions whose dismissal gave rise to this petition were collateral civil actions attempting to halt the criminal investigation by the grand jury and Independent Counsel in the Iran/Contra matter. As such, these actions conflicted with fundamental principles which have repeatedly been reaffirmed by this Court. First, equitable principles bar the granting of injunctive or declaratory relief against criminal investigations and prosecutions, except in extraordinary circumstances not found

here. Second, this Court has repeatedly refused to permit collateral attacks upon ongoing criminal investigations at the pre-indictment stage. Thus, the decisions of the courts below are fully consistent with the decisions of this Court. There is no conflict in the circuits justifying review by this Court.

Finally, the underlying issue in this case—the authority of Independent Counsel to conduct his investigation of the Iran/Contra matter—has now been resolved. Even if petitioner's pre-indictment civil complaints were otherwise appropriate, the courts have now foreclosed the substantive relief he seeks. For all of these reasons, this Court should decline to review this matter.

I. PETITIONER'S CIVIL ACTIONS WERE PROPERLY DISMISSED AS IMPERMISSIBLE COLLATERAL ATTEMPTS TO ENJOIN AN ONGOING CRIMINAL INVESTIGATION

Petitioner admits that "this Court in recent years has cautioned restraint in federal court interference, through injunctive relief, with pending state criminal prosecutions" (Pet. 11-12). Indeed, as described below, this Court has long held that state law enforcement efforts may be enjoined or declared unconstitutional only in "extraordinary circumstances," that is, where the law enforcement activities create a threat of irreparable injury that is "great and immediate," and have been conducted in bad faith or for purposes of harassment. No lesser restriction on judicial power should apply where federal criminal investigative activities are concerned. Since no "extraordinary circumstances" can be found on the facts of this case, a remand is neither necessary nor appropriate.

It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law" and will not

suffer irreparable injury if denied equitable relief. *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1525 (1987), *quoting Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This doctrine "prevent[s] erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Younger*, 401 U.S. at 44. Thus, this Court has long held that "in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment" in an ongoing state criminal prosecution. *Kugler v. Helfant*, 421 U.S. 117, 123 (1975) (citation omitted). *See also Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (equitable relief against state prosecutions is available "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances").

This Court has also recognized the importance of judicial restraint where federal courts are asked to enjoin or declare unconstitutional state law enforcement practices, even though no criminal prosecutions are pending. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 112 1983); *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976). Thus, in *Rizzo*, the Court held that a federal court abused its equitable discretion in directing a police department to revise its police manuals and procedures for handling complaints of minority citizens, noting that "principles of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances," 423 U.S. at 379, and that "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint." *Id.* at 379-80, *quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

A similar restraint on the federal judiciary's exercise of its equitable powers has been recognized where federal criminal investigations are concerned.[3] Thus the lower federal courts, applying the principles enunciated by this Court, have held that, to the extent challenges to federal criminal investigative activities are justiciable at all, such activities may be enjoined or declared unconstitutional only in the most "extraordinary circumstances." *See e.g., Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche v. Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); *see also Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968); *In re Grand Jury Subpoena to Central States*, 225 F. Supp. 923, 925 (N.D. Ill. 1964).

No such "extraordinary circumstances," as defiined by this Court, are presented by the facts of this case. Petitioner has not shown the necessary "great and immediate" irreparable injury. Nor has he suggested that the investigation was conducted in "bad faith," for purposes of "harassment," or in flagrant and patent violation of express constitutional prohibitions. *See Younger*, 401 U.S. at 46, 53-54; *see also Lyons*, 461 U.S. at 112. Indeed, the *Younger* Court explicitly noted that:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend

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[3] Petitioner's assertion that *Younger* principally concerns federal-state relations (Pet. 12, 13) is inconsistent with this Court's interpretation of that decision. The Court has recently made clear that the "first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity . . . should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law.'" *Pennzoil Co.*, 107 S. Ct. at 1525, *quoting Younger*, 401 U.S. at 43. Principles of comity and federalism were a "second explanation," *Pennzoil Co.*, 107 S. Ct. at 1525, that only "reinforced" the "underlying reason" for judicial restraint. *Younger*, 401 U.S. at 44.

> against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, *the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.*"

401 U.S. at 46 (citation omitted; emphasis added). Here petitioner must concede that the worst that can happen to him as a result of the Independent Counsel statute and regulation which he regards as unconstitutional is that he would be indicted. Accordingly, petitioner here is in precisely the situation designated by the Court as insufficient to constitute an "irreparable injury." [4]

Moreover, petitioner's fundamental misreading of *Younger* and its progeny underlines that any purported "conflict" in the Circuits is illusory. The decisions invoked by petitioner (Pet. 6-11), *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *cert. granted*, 107 S. Ct. 1885 (1987), *vacated and remanded as moot*, 108 S. Ct. 52 (1987), and *Smith v. Meese*, 821 F.2d 1484 (11th Cir. 1987), concerned issues fundamentally different from those involved in the instant case and in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) (Pet. App. 70a).

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[4] *Steffel v. Thompson*, 415 U.S. 452 (1974), relied upon by petitioner (Pet. 11-16), is not to the contrary. In *Steffel*, the Court held that a declaratory judgment action was permissible to test the constitutionality of a statute under which the plaintiff faced a "genuine threat" of prosecution. *Wooley v. Maynard*, 430 U.S. 705, 710 (1977). *Steffel* allowed litigants to steer "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462. Here, petitioner does not claim that he may have violated the Independent Counsel provisions of the Ethics in Government Act or the Attorney General's independent counsel regulation, and he does not claim that he has foregone any arguably constitutionally protected activity because of these laws. Accordingly, *Steffel* is of no aid to petitioner in seeking a declaratory judgment on the validity of these laws.

Olagues was a class action in which a group of Chinese and Hispanic Americans challenged a federal vote fraud investigation of foreign-born voters who requested bilingual ballots. There the Ninth Circuit adopted the plaintiffs' contention that "such a classification must be subjected to strict scrutiny under equal protection clause analysis because it discriminates on the basis of language, race, and national origin." *Olagues*, 797 F.2d at 1520. In *Smith v. Meese*, 821 F.2d 1484, 1489 (11th Cir. 1987), the court reversed the dismissal of a challenge by a group of black voters and elected officials to an allegedly discriminatory pattern and policy of federal vote fraud investigations, on the ground that this "policy and pattern of investigatory and prosecutory decisions . . . ha[d] the effect of depriving [plaintiffs] of their constitutional rights to vote and to associate freely."

Both *Olagues* and *Smith* involved First Amendment and equal protection challenges to alleged patterns of prosecutorial discrimination. As such, they are consistent with the observation of the *Deaver* court that "in the past few decades, the Supreme Court has upheld federal injunctions to restrain state criminal proceedings *only* where the threatened prosecution chilled the exercise of First Amendment rights." *Deaver*, 822 F.2d at 69 (Pet. App. 70a, 77a) (citing, *inter alia*, *Steffel v. Thompson*, 415 U.S. 452 (1974); emphasis added). Petitioner here, in contrast, does not even make a First Amendment or equal protection claim. The *Smith* court explicitly noted the important difference between a class action to protect group rights and an individual attempt to escape criminal investigation or prosecution:

> "It is important to note that the plaintiffs in this case are not attempting to have the federal judiciary review individual decisions to investigate or prosecute anyone. . . . We are not asked to block or require the prosecution of any individual; instead, the plaintiffs have asked the federal court to order the

> defendants to stop following a deliberate policy of discriminatory investigations and prosecutions."

Smith, 821 F.2d at 1490 (footnotes omitted). Thus, petitioner is seeking precisely the relief that the *Smith* court explicitly—and the *Olagues* court implicitly—distinguished from the situations that were before the District of Columbia Circuit in this case and in *Deaver*.

Finally, it must be noted that petitioner seeks nothing less than to enjoin a grand jury proceeding. This Court has repeatedly recognized that an essential part of fair and expeditious law enforcement is the grand jury investigation, the purpose of which is "to determine whether a crime has been committed and whether criminal proceedings should be instituted." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). To ensure that grand juries are able to discharge their duties effectively and efficiently, they are invested with broad powers. *E.g., Blair v. United States*, 250 U.S. 273, 282 (1919).

The courts have consistently rejected collateral challenges to grand jury investigations. For example, in *Blair*, a federal grand jury was empaneled to investigate possible violations of the Federal Corrupt Practices Act. Witnesses called before the grand jury refused to testify, claiming that the grand jury was without authority since the Act was unconstitutional. Holding that this collateral attack on the grand jury's authority was premature, this Court stated that an individual "is not entitled to challenge the authority of . . . the grand jury, provided they have a *de facto* existence and organization." 250 U.S. at 282 (emphasis added). Similarly, in *Calandra* the Court held that the Fourth Amendment exclusionary rule may not be invoked by a witness before a grand jury. The Court explained that "[p]ermitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." *Calandra*, 414 U.S. at 349. *See also United*

States v. Dionisio, 410 U.S. 1, 17 (1973) (impeding a grand jury's investigation "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws").

Furthermore, petitioner's claims are not ripe for consideration. Pursuant to the "case and controversy" limitation set forth in Article III of the Constitution, the federal courts have consistently held that they have no power to decide cases that are premature or not "ripe" for adjudication. *See, e.g., United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). As used in this context, ripeness requires in essence that a litigant attempting to invoke the power of a federal court present a claim that is sufficiently mature that "definite rights appear upon the one side and definite prejudicial interferences upon the other." 330 U.S. at 90 (footnote omitted). *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892). Because the pre-indictment claims raised by petitioner failed to satisfy that test, they were properly dismissed.

Thus, petitioner's actions were properly dismissed, not only as an illegitimate attempt to frustrate an ongoing criminal investigation, but also as a premature assertion of an unripe constitutional claim.

II. THE CASE DOES NOT MERIT REVIEW BY THIS COURT BECAUSE THE UNDERLYING SUBSTANTIVE ISSUE IN THE CASE HAS ALREADY BEEN RESOLVED IN ANOTHER PROCEEDING

Petitioner states that his complaints in the two underlying civil actions in this case sought judgments that "the independent counsel provisions of the Ethics in Government Act are unconstitutional" and that the Attorney General's parallel appointment was "rife with constitutional and statutory infirmities" (Pet. 3, 4). Because In-

dependent Counsel's investigation has now been upheld against petitioner's own identical constitutional challenge in a subsequent proceeding, the underlying merits of the instant case have been resolved, and have no claim upon the attention of this Court.

As noted earlier, petitioner refused to comply with a grand jury subpoena and challenged the authority of Independent Counsel to conduct his investigation. The district court upheld the authority of Independent Counsel to conduct the investigation, and the court of appeals affirmed. *In re Sealed Case*, Misc. No. 87-00139 (D.D.C. July 10, 1987), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987). The court of appeals held that "Walsh and his associate counsel derive the necessary legal authority from the Attorney General's regulation of March 5, 1987, regardless of whether they also have this authority pursuant to their appointments under the Ethics Act." *Id.* at 62. A petition for a writ of certiorari to review this decision was denied by this Court on January 19, 1988. *North v. Walsh*, No. 87-869.[5]

In short, Independent Counsel's authority has been definitively upheld. Thus, even if this Court were to reverse the court of appeals in the instant case and rule that petitioner's claim should have been considered on the merits, the substantive relief that petitioner seeks will not be granted.[6] The power to measure the authority

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[5] On January 22, 1988, a divided panel of the court of appeals, in a case involving another Independent Counsel who had not accepted a parallel appointment from the Attorney General, held the Independent Counsel statute unconstitutional. *In re Sealed Case*, No. 87-8261 (D.C. Cir. Jan. 22, 1988). Even the panel majority in that case, however, expressly reaffirmed the validity of the Attorney General's appointment of Independent Counsel. *See* Slip op. at 17.

[6] Principles of res judicata also argue against this Court reviewing the decision of the court of appeals. The first Justice Harlan's oft-quoted summary of the doctrine states that "a right, question or fact distinctly put in issue and directly determined by a court

of government " 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), *quoting Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892). The requirement of a live controversy applies not only at the time when the complaint is filed, but at all stages of review as well. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). *See also Sosna v. Iowa*, 419 U.S. 393, 402 (1975) ("there must be a live controversy at the time this Court reviews the case.") The substance of this action having been determined by the courts, there is obviously no "real, earnest and vital" controversy here. Accordingly, the Court should decline to enter a dispute about this case's procedural underpinnings.

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of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies[.]" *Southern Pacific Ry. v. United States*, 168 U.S. 1, 48 (1897). Because the identical issue has been raised and resolved between the same two parties, there is no need for further review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court may enjoin or declare unlawful a criminal investigation where the only injury alleged is that the investigation is being conducted by a person without authority to do so.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the court of appeals (Pet. App. 1a-2a, 3a-4a) are not yet reported. The opinion of the district court (Pet. App. 5a-24a) is reported at 656 F. Supp. 414.

JURISDICTION

The judgments of the court of appeals were entered on October 1, 1987. The petition for a writ of certiorari was filed on December 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, provides for the appointment of an independent counsel to investigate and prosecute certain

members of the Executive Branch charged with criminal conduct. Whenever the Attorney General receives information sufficient to constitute grounds to investigate allegations that a person covered by the Act has committed a violation of any federal criminal law (other than a petty offense), the Act requires that he conduct an investigation of the matter for a period not to exceed 90 days. 28 U.S.C. 592(a)(1). If the Attorney General finds reasonable grounds to believe that the matter warrants further investigation or prosecution, the Act requires that he apply to a special division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an Independent Counsel. 28 U.S.C. 49, 592(c)(1) and (d)(1). Upon receipt of such an application, the special division of the court of appeals must appoint an appropriate Independent Counsel and define a prosecutorial mandate. 28 U.S.C. 593(b). An Independent Counsel so appointed enjoys the authority to exercise virtually all investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General, including the authority to conduct proceedings before grand juries, to apply for warrants, subpoenas, and other court orders, and to frame indictments, file informations, and handle all aspects of a case in the name of the United States. 28 U.S.C. 594(a).

2. On December 4, 1986, respondent Attorney General Meese applied for the appointment of an Independent Counsel to investigate whether petitioner North and others may have violated any federal criminal laws with regard to the transfer of arms to Iran or the disposal of the resulting proceeds (Pet. App. 12a). On December 19, 1986, respondent Lawrence E. Walsh was appointed by the special division of court as Independent Counsel to investigate this so-called "Iran/Contra Affair" (*ibid.*). Respondent Walsh promptly began his investigation,

empaneled a grand jury, served numerous subpoenas, and otherwise explored various aspects of petitioner's participation in the Iran/Contra Affair (*ibid.*).

On February 24, 1987, petitioner filed suit against respondent Walsh and respondent Attorney General Meese in the United States District Court for the District of Columbia (Pet. App. 12a). Petitioner challenged the authority of respondent Walsh to conduct his investigation and sought a declaratory judgment that the independent counsel provisions of the Ethics in Government Act are unconstitutional (*id.* at 12a, 36a-38a).[1] On March 2, 1987, respondent Walsh moved to dismiss the suit, arguing that petitioner was engaged in an impermissible collateral attack on an ongoing criminal investigation, that petitioner's claims were not ripe, and that the disputed provisions of the Act are constitutional (*id.* at 12a-13a). On March 5, 1987, respondent Attorney General Meese similarly filed a motion to dismiss, joining in the procedural arguments of respondent Walsh and additionally arguing that petitioner lacked standing to challenge the Act's constitutionality (*id.* at 13a).

To remove any doubt concerning respondent Walsh's authority to conduct the investigation, the Attorney General, on that same day, promulgated new regulations establishing an "Office of Independent Counsel: Iran/Contra" within the Department of Justice (28 C.F.R. Pts. 600, 601) and appointed respondent Walsh to

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[1] Specifically, petitioner alleged that respondent Walsh, while performing investigative and prosecutorial functions reserved to the Executive under Article II of the Constitution, and thus purporting to act as an Officer of the United States within the meaning of Art. II, § 2, had not been appointed by the President or by a Department Head, as the Constitution requires. Petitioner alleged that the independent counsel provisions thus violated separation of powers principles. See Pet. App. 36a-38a.

head the Office (Pet. App. 13a). Under that appointment, respondent Walsh was empowered to investigate the same matters and activities that he had undertaken to investigate pursuant to his appointment under the Act (*ibid.*). Petitioner responded, on March 6, 1987, by filing a second complaint in the district court, alleging that the new regulations and appointment were legally infirm (*id.* at 42a). On March 9, 1987, respondent Walsh moved to dismiss the second complaint as well (*id.* at 13a-14a).

With the consent of all parties, the district court, on March 9, 1987, heard argument on the procedural issues relevant to both complaints (Pet. App. 13a-14a). Then, on March 12, 1987, the district court dismissed both complaints (*id.* at 5a-24a). Without resolving the questions raised concerning petitioner's standing or the constitutionally of the Act, the court determined that petitioner had "not alleged a sufficient hardship to meet the ripeness standard and to [allow] anticipatory judicial involvement in the ongoing criminal investigation" (*id.* at 14a). It noted that "[c]ourts have almost never found that an ongoing criminal investigation imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment" (*id.* at 17a). And the court found that petitioner's allegations were not sufficient to bring this case within the "extraordinary circumstances" exception to the general rule, because petitioner's "only claim of injury is that he is the subject of an investigation which is headed by a public official who is, he alleges, without that authority" (*id.* at 21a), and because "[t]his 'injury' does not rise to the level of concrete hardship warranting judicial review at this time" (*ibid.*). Rather, given the nature of the injury alleged, the court determined that "Colonel North, like any other potential criminal defendant, can raise his objections by appropriate motion, *if* and *when* an indictment is entered" (*id.* at 23a). On that premise, the court

ruled that petitioner's "challenge to the constitutionality of the independent counsel machinery is not ripe for adjudication" (*id.* at 24a).

3. Petitioner promptly filed a notice of appeal. Respondent Walsh answered with a motion for summary affirmance based principally on the court of appeals' recent decision in *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987), cert. denied, No. 86-2026 (Oct. 5, 1987) (Pet. App. 70a-85a).[2] While that appeal was pending, however, petitioner refused to comply with a subpoena issued by the grand jury that respondent Walsh had empaneled to investigate the Iran/Contra matter and was accordingly held in contempt by the district court. On appeal of that contempt order, the court of appeals found that petitioner's challenge to the validity of respondent Walsh's status as prosecutor was ripe for review, but that a remand was necessary so that the district court could initially decide whether the parallel appointment by the Attorney General mooted the constitutional question that petitioner had raised. *In re Sealed Case*, 827 F.2d 776 (1987) (*North I*).

On remand, the district court ruled that the Attorney General's parallel appointment of respondent Walsh was valid and that resolution of petitioner's constitutional challenge was unnecessary. In August 1987, the court of appeals affirmed the district court's judgment in all

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[2] The *Deaver* case also involved the dismissal on procedural grounds of a challenge to the constitutionality of the appointment of an Independent Counsel. In *Deaver*, the court of appeals held that an assertion that the imminent return of an indictment threatened irreparable injury was not a sufficient basis for allowing a plaintiff to maintain an ancillary civil challenge to a criminal investigation. Rather, the court determined that Federal Rule of Criminal Procedure 12(b)(1), which permits a criminal defendant to raise arguments concerning the alleged constitutional infirmities of the proceeding against him as a defense following indictment, provides an adequate remedy in such cases.

respects. *In re Sealed Case* (*North II*), 829 F.2d 50 (1987). On January 19, 1988, this Court denied a petition for a writ of certiorari from that judgment (No. 87-869).

4. Prior to this Court's denial of the petition from the judgment in *In re Sealed Case* (*North II*), the court of appeals summarily affirmed the district court's dismissal of petitioner's complaints in this case (Pet. App. 1a-4a). The court of appeals found that "Colonel North, like the appellant in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action" (Pet. App. 2a). The court explained that "[i]t is clear, after *Deaver*, that potential criminal defendants 'cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure' " (*ibid.* (citation omitted)).[3]

ARGUMENT

1. Petitioner asks the Court to decide (Pet. i) "[w]hether the target of a federal criminal investigation being conducted in violation of the Constitution and laws of the United States is absolutely barred from seeking declaratory or injunctive relief from that investigation in federal court." But, in *In re Sealed Case* (*North II*), the court held "that Walsh and his associate counsel derive the necessary legal authority from the Attorney General's regulation of March 5, 1989" (829 F.2d at 62) and, furthermore, that petitioner cannot establish any cognizable harm to support a ripe constitutional challenge (because

[3] Following the decision in this case, the court of appeals in another proceeding held the Independent Counsel provisions of the Ethics in Government Act to be unconstitutional. *In re Sealed Case (Olson)*, No. 87-5261 (D.C. Cir. Jan. 22, 1988), appeal docketed, No. 87-1279 (Feb. 1, 1988).

respondent Walsh's parallel appointment vests him with "identical authority" to that provided by the Act) (*id.* at 61-62). Thus, even if, under some circumstances, a federal court could grant equitable relief to the target of a federal criminal investigation being conducted in violation of the Constitution and the laws of the United States, it would be improper to grant such relief to petitioner in this case. The court of appeals has already decided, in a final judgment that this Court has declined to review, that respondent Walsh is authorized by the Attorney General's appointment to conduct the Iran/Contra investigation. The decision in that case has disposed of the premise on which petitioner's request for equitable relief was based and thus deprives petitioner's legal issue of any practical effect.

2. Even disregarding the effect of the ruling upholding respondent Walsh's authority to conduct the Iran/Contra investigation, it is clear that review by this Court is not warranted. The petition mischaracterizes the judgment of the court below and thus suggests a conflict among the circuits that does not actually exist.

Contrary to petitioner's repeated suggestion (Pet. i, 6, 8, 9, 10-11, 14-16), the court of appeals did not hold that the target of a federal criminal investigation is absolutely barred from seeking declaratory or injunctive relief from that investigation in federal court. No such question was presented for review by the court below. The only question presented for the court's review was whether the target of a pending criminal investigation may obtain such relief where the only injury he claims is that he is the subject of an investigation headed by a public official who is allegedly without authority to conduct the investigation. The court of appeals held (Pet. App. 2a, 4a) that, where only that kind of injury is alleged, the target of the criminal investigation may not obtain declaratory or injunctive relief.

That holding is a far cry from the absolute rule against judicial interference with a pending criminal investigation that petitioner alleges the court adopted in this case.

The decision below therefore does not, as petitioner suggests (Pet. 6-11), conflict with the decision in either *Olagues* v. *Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (en banc), vacated and remanded with instructions that the case be dismissed as moot, No. 86-1217 (Oct. 5, 1987), or *Smith* v. *Meese*, 821 F.2d 1484 (11th Cir. 1987). The judgment of the Ninth Circuit in *Olagues* has been vacated as moot and for that reason clearly cannot be relied upon to support a claim of conflict with the judgment here. Moreover, neither *Olagues* nor *Smith* concerned the question whether a court may declare unlawful or enjoin a pending criminal investigation where the only constitutional claim in issue relates to the authority of the prosecutor to conduct the investigation in the first instance. Rather, the courts in *Olagues* and *Smith* addressed questions concerning whether a federal court may entertain prayers for declaratory and injunctive relief where the constitutional claim raised relates to the "chilling effect" an investigation has on First Amendment or voting rights. Both courts held that, where such injuries are alleged, a federal court has equitable authority to entertain a pre-indictment challenge to the conduct of the investigation. See also *Juluke* v. *Hodel*, 811 F.2d 1553 (D.C. Cir. 1987). Whether or not those holdings are correct, they address claims that, as both the district court here and the panel in *Deaver* recognized (Pet. App. 22a n.13, 76a, 78a-79a & n.8, 84a-85a), are quite different from the claim raised in this case. Where, as here, an individual alleges only that he is subject to an investigation that is headed by a public official without authority to conduct it, the individual's ability to raise the invalidity of the investigation as a defense to any ensuing indictment is an adequate remedy.

Equitable relief is therefore unwarranted. See *Younger* v. *Harris*, 401 U.S. 37, 46 (1971); *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163 (1943); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

Petitioner similarly errs in suggesting (Pet. 11-16) that the decision below ignores or conflicts with this Court's decisions in *Younger* v. *Harris, supra*, or *Steffel* v. *Thompson*, 415 U.S. 452 (1974). While, as petitioner suggests, the decision in *Younger* was "reinforced" by federalism principles, the "first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity * * * should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law.' " *Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987), slip op. 7 (citation omitted). Thus, contrary to petitioner's suggestion, the lower federal courts, including the District of Columbia Circuit, have uniformly held that, to the extent they are subject to legal challenge at all, federal criminal investigative activities may be enjoined or declared unlawful only in the most "extraordinary circumstances." See, *e.g.*, *Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978). Similarly, while *Steffel* did hold, as petitioner suggests, that there are some cases in which declaratory but not injunctive relief may issue (415 U.S. at 466-473), the "extraordinary circumstances" standard applies to prayers for declaratory as well as for injunctive relief. See *Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975). The court of appeals simply affirmed the district court's conclusion (Pet. App. 17a-23a) that *Younger*'s "extraordinary circumstances" standard was not satisfied by petitioner's allegations. The judgment of the court of appeals is therefore in no sense inconsistent with *Younger* or *Steffel*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 87-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH,

Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, and EDWIN MEESE III, ATTORNEY GENERAL,

Respondents.

OLIVER L. NORTH,

Petitioner,

v.

EDWIN MEESE III, ATTORNEY GENERAL, and LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents do not seriously contend that the issue presented in the petition—whether the target of an unlawful federal criminal investigation is absolutely

barred from seeking declaratory or injunctive relief from that investigation in federal court—is not a significant one warranting this Court's attention. Instead, they maintain (1) that prior court decisions already have resolved the merits of petitioner's claim; and (2) that the decision below is not at odds either with this Court's prior rulings, or with decisions of other courts of appeals. As to the first point, respondents are flatly wrong. As to the second point, the ruling below broadly expands existing limits on access to a federal forum to vindicate constitutional claims and cannot so simply be dismissed.

1. Respondents contend that in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, —— U.S. —— (1988), the court of appeals ruled that Independent Counsel Lawrence E. Walsh "is authorized by the Attorney General's appointment to conduct the Iran/Contra investigation," Brief for the Attorney General in Opposition ("A.G. Brief") at 7. Thus, respondents maintain, the premise of petitioner's request for equitable relief—that the investigation by respondent Walsh is unlawful—no longer exists. *See id.*; Brief for Respondent Lawrence E. Walsh ("Walsh Brief") at 14-17.

The authority of respondent Walsh has not, however, been "definitively upheld." Walsh Brief at 15. The court of appeals' ruling on which respondents rely *expressly* limited its scope to the independent counsel's authority to issue "the specific subpoena with which [petitioner] refused to comply." *In re Sealed Case*, *supra*, 829 F.2d at 62 n.60. The court refused to consider the lawfulness of the entire delegation of authority by the Attorney General to Mr. Walsh, but instead narrowly considered solely the lawfulness of the delegation of authority to cause issuance of the subpoena at bar. The court declined to consider petitioner's broader claim, stating that petitioner "may not rely upon the fortuitous circumstance of receiving that subpoena to effect an end run around the rule we announced in *Deaver* v. *Seymour* and in so doing

challenge the entire investigation." *Id.* It is therefore baseless to argue that petitioner's challenge to "the entire investigation" was resolved in that case.[1]

2. Despite respondents' suggestion otherwise, petitioner has not and does not claim a right to equitable relief from an indictment. *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987) held that the Federal Rules of Criminal Procedure provide a remedy for wrongful *indictment*, and petitioner takes no issue with that holding here. Those rules, however, provide no remedy for injury of the kind petitioner complains.[2] As the petition estab-

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[1] Moreover, before the Attorney General's regulation was promulgated, petitioner filed a separate action challenging the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.* Respondent Walsh still purports to be acting under that authority, even though at least one court of appeals now has held that Act to be unconstitutional. *In re Sealed Cases*, Nos. 87-5261, 5264 and 5265 (D.C. Cir. Jan. 22, 1988), appeal docketed, No. 87-1279 (Feb. 1, 1988). Whatever the merits of petitioner's *subsequent* challenge to the Attorney General's regulation, respondent Walsh's exercise of authority under the Act remains—as does the "premise" of petitioner's claim.

Indeed, respondent Walsh is incorrect to assert that petitioner is not entitled to the relief sought because his authority has already been upheld. There is a vast difference between a ruling upholding respondent's authority to issue a subpoena when he purportedly had authority pursuant to both the Act and the regulation, and a ruling that his conduct under the Act cannot be challenged even when that Act was his *sole* source of authority. In the latter case, the subsequent promulgation by respondents of a regulation revocable at will—even if valid—cannot serve to moot petitioner's challenge to the exercise of authority under the Act. *See United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

[2] The Brief for the Attorney General gives the court of appeals' ruling a narrower reading than it can tolerate. Petitioner did not allege, as his only injury, that "he is the subject of an investigation headed by a public official who is allegedly without authority to conduct the investigation." A.G. Brief at 7. Far from it, petitioner challenged the exercise by an otherwise private attorney of coercive law enforcement powers unlawfully delegated to him and the use of

lishes, petitioner seeks equitable relief not from a possible future indictment, but from the independent counsel's current unlawful use of his authority to compel disclosure of personal information, such as tax returns, to coerce compliance with subpoenas by persons in privity with petitioner, and to disclose confidential matters to Congress and the press. Like the chilling effect of a criminal investigation conducted in violation of the First Amendment, the present injury arising out of these unlawful intrusions cannot ever be remedied by dismissal of an indictment.

Respondents' efforts to distinguish *Olagues* v. *Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *cert. granted*, 107 S. Ct. 1885 (1987), *vacated and remanded as moot*, 108 S. Ct. 52 (1987), and *Smith* v. *Meese*, 821 F.2d 1484 (11th Cir. 1987), therefore fall short. *Olagues* and *Smith* are notable not because they involve the First Amendment but because they involve allegations of injury arising from a federal criminal investigation that will not be remedied at a later date by dismissal of a possible indictment. Precisely the same is true of the injuries flowing from the placement of coercive law enforcement authority in the hands of persons with no lawful authority whatsoever—persons who are unhinged from the institutional wisdom and restraint of the Executive Branch. Respondents offer no reason whatsoever—no principles of comity or separation of powers—*why* federal courts should close their doors to such claims of unlawful and intrusive police power.[3]

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those powers to, among other things, compel disclosure of private information to which he otherwise had no right of access. The Attorney General ignores the difference between being the "mere" subject of an investigation and being the subject of repeated, intrusive incursions into one's personal affairs.

[3] Respondents and the court of appeals charge that petitioner seeks to enjoin the actions of a grand jury, as had movant in *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987). In fact, petitioner has sought to assure only that properly authorized persons participate

3. Finally, respondents' efforts to rewrite *Younger* v. *Harris*, 401 U.S. 37 (1971), into a decision based on equitable principles alone, and not comity, is misplaced. As recently as in *Pennzoil Co.* v. *Texaco, Inc.*, —— U.S. ——, 107 S. Ct. 1519, 1525 (1987), this Court reaffirmed the dual basis for the *Younger* decision and quoted that opinion's federalism discussion at length in the context of a case involving federal court interference with state court proceedings. Respondents' need to rely on that case to defend the court of appeals' holding regarding federal court interference with a federal criminal investigation merely demonstrates the lack of support, in this Court's jurisprudence, for the ruling below.

CONCLUSION

For these reasons and the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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in the conduct of the grand jury or share in the exercise of its extraordinary powers. There has never been a suggestion, for example, that a grand jury could not proceed under the direction of the U.S. Attorney for the District of Columbia.